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Held at the Palais des Nations, Geneva, on Thursday, 12 July 2018, at 10 a.m.

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Protection of the environment in relation to armed conflicts (*continued*)

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

Mr. Hmoud, expressing thanks to the Special Rapporteur for her well-researched and capably drafted first report on the topic "Protection of the environment in relation to armed conflicts" (A/CN.4/720), said that one of the challenges inherent to the topic, aside from the general dispersal of relevant rules among international humanitarian law, human rights law and environmental law, was the need to arrive at a set of principles that took into account realities on the ground as well as the various legal interests and policy considerations. The law of armed conflict and its subcategory, the law on occupation, had been codified for decades, notably with the adoption of the 1907 Regulations respecting the Laws and Customs of War on Land (the Hague Regulations), the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) and the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I). However, the rules on environmental protection were fairly new and many were still in development, which made the process of identifying the rules relevant to environmental protection during occupation particularly challenging. Indeed, colleagues who had spoken before him had expressed a range of views in that regard, with some asserting the need for full protection and others doubting the existence of any particular form of environmental protection during occupation. Nonetheless, the report demonstrated with relative certainty that jurisprudence, State practice and the legal literature supported the existence of environmental protection both in the general context of armed conflict and in situations of occupation. The challenge lay in determining the scope of such protection in a manner that reflected the existing rules of international law and the pressing environmental protection concerns of the international community.

The report provided ample sources on the topic of occupation and the rights and obligations involved, including those relating to environmental protection. For him, the core question was whether the issue of occupation should be dealt with in the context of the general rules on the protection of the environment during armed conflict or through a specific review of the topic of occupation. In other words, should the Commission spell out the rules relating to environmental protection during occupation or consider the other rules or principles applicable to armed conflict as applicable to occupation? By deciding to provide for particular rules, the Commission should not deviate from the principles set out by the International Court of Justice, as cited in the report. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court had stated that it "considers the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions of derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights." It had gone on to add

> "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law".

The Court's statement made clear that the whole of international humanitarian law was applicable in the situation of occupation which was the subject of the court's proceeding and not only particular rules. The Court did not place any limitations regarding the applicability of international humanitarian law and human rights law or on the interrelationship between those two branches of law, the first being *lex specialis*. Therefore, that integrated regime of applicability should not be restricted to occupied territories, and the goals of protection of the civilian population under both branches should be upheld.

Another relevant aspect of the Court's aforementioned advisory opinion was that situations of occupation were part of situations of armed conflict, and that the law of armed

conflict continued to apply for as long as occupation existed. The fact that active hostilities ceased to exist did not bring the occupied territory outside the realm of protection of the relevant rules of international humanitarian law, as expressly provided for in Additional Protocol I, which conditioned termination of application of the Protocol by the end of occupation and without any qualification. The same could be inferred from article 2 common to the four Geneva Conventions relating to the protection of victims of international armed conflicts (Geneva Conventions of 1949). It was clear that neither the type nor the duration of occupation affected the applicability of international humanitarian law as *lex specialis*, so long as the occupation was ongoing.

Protection of the civilian population under international humanitarian law continued even if agreements were concluded between the local authorities and the occupying Power, as was clear from article 47 of the Fourth Geneva Convention. That was an important consideration in the debate on whether to distinguish between situations of belligerent occupation and of pacific occupation, which had to take into account the fact that the law of occupation, as part of international humanitarian law, was driven primarily by humanitarian considerations and did not cease to apply until occupation had effectively ended on the ground. Normally, that was effected by restoring the sovereignty of the sovereign State over the occupied territory or by achieving independence through the exercise of the right of self-determination.

In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had decided that the rules of international humanitarian law relevant to occupation were applicable to the Occupied Palestinian Territory, including those contained in the Fourth Geneva Convention and customary international law, despite the fact that the Israeli occupation was a prolonged occupation and that there existed an administration, the Palestinian National Authority, established pursuant to the Oslo Accords. Israel had argued in its submission that the Fourth Geneva Convention was not applicable and had contested the sovereignty of Jordan over the West Bank — where the separation wall was being built — at the time of the 1967 war. The Court had refuted that argument asserting that the Convention applied, by virtue of article 2 thereof, because both Jordan and Israel were parties to the Convention and an armed conflict existed between the two parties in which the territory in question was under the military occupation of Israel. Accordingly, the Court had refused to examine the issue of the sovereignty of Jordan over the West Bank on the grounds that it was irrelevant to the application of the Convention. He wished to state, however, that the sovereignty of Jordan over the West Bank prior to 1967 had been *de jure* and had resulted from the exercise by the Palestinian population of their right to self-determination. Such exercise had occurred through the 1950 unity agreement between Jordan and the West Bank. Furthermore, Jordan had been admitted as a Member State of the United Nations, in 1955, with the West Bank as part of its territory; and when Israel had launched an attack on Hebron in the West Bank in 1966, the Security Council had condemned that attack, noting in its resolution 228 (1966), that it was "a carefully planned military action on the territory of Jordan by the armed forces of Israel".

The only limitations on the applicability of human rights law in the occupied territories were those contained in international humanitarian law regarding the application of protections under that law: where a matter was not regulated by international humanitarian law but was regulated by human rights law, it was exclusively under the regime of the latter. There was no basis, whether under the Hague Regulations or the Geneva Conventions of 1949 and Additional Protocol I, for considering that international humanitarian law and its subcategory, the law of occupation, limited the protection of human rights law where the area was not regulated or where the rules on occupation did not provide the intended protection. In its judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had affirmed that the obligation of the occupying Power under article 43 of the Hague Regulations to take all the measures in its power to restore, and ensure, as far as possible, public order and public life entailed the duty to secure respect for the applicable rules of international human rights law and international humanitarian law.

Another general point to be dealt with was the question of when territory was considered to be occupied. Article 42 of the 1907 Hague Regulations provided that territory was considered occupied when it was placed under the authority of the hostile army and that occupation extended only to the territory where such authority had been established and could be exercised. That "effective control principle" set out in those provisions was well established. He agreed with the Special Rapporteur that the application of the principle entailed a factual examination of the particular situation and was determined on a case-by-case basis. Full control was not required so long as control was effective. The International Court of Justice had reaffirmed, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that article 42 of the Hague Regulations was customary international law and had cited its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in that regard. Although the same principle had been applied in both cases, a different set of facts had been examined to reach the same conclusion. The territory of the Democratic Republic of the Congo had been occupied by Uganda, which had substituted its own authority for that of the Government of the Democratic Republic of the Congo. The Court had also considered the whole Palestinian territory occupied in June 1967 to be occupied, even though Israeli authority had not been fully exercised in areas under the jurisdiction of the Palestinian National Authority. Regarding the issue of whether the withdrawal of Israel from Gaza had ended its occupation in that part of the Palestinian territory, it should be noted that Gaza remained under the effective control of the Israeli occupying Power, as reaffirmed in Security Council resolution 1860 (2009) and numerous General Assembly resolutions adopted subsequent to the withdrawal of Israeli forces — or, more precisely, redeployment.

The law of State responsibility was a different matter from international humanitarian law and its rules on occupation and related obligations. The fact that an occupying Power might not be responsible for acts that were not attributable to it in areas where it did not have control did not relieve that Power of its international humanitarian law responsibilities towards the occupied territories in their entirety, to the extent that it could fulfil such obligations. Armed groups and other parties to an armed conflict were clearly subject to the relevant international humanitarian law rules in the occupied territory as a situation of international armed conflict.

Turning to the issue of environmental protection, he said that because environmental law rules were fairly new as compared to rules of international humanitarian law on occupation, the question that arose was whether such rules applied and to what extent they did so in light of the *lex specialis* character of international humanitarian law. Obviously, the general rules as contained in Part Two of the draft principles were applicable to the situation of occupation. Care must be taken to protect the natural environment, rules of armed conflict must be applied to the natural environment with a view to its protection, and environmental considerations must be taken into account. Such principles reflected the integral application of the rules of international humanitarian law, with the relevant rules of environmental protection that would continue to apply during armed conflict.

One particularity that applied to occupied territories stemmed from the obligation of the occupying Power, under article 43 of the Hague Regulations, to restore and ensure public order and public life and to respect the national laws in force in the territory occupied unless absolutely prevented from doing so. The lack of specific provisions on environmental protection in the law on occupation required that interpretation of the relevant provisions should take into account other rules of international law, namely those contained in the corpus of international environmental law; it also was necessary for such rules to fill the gaps where the law of occupation did not provide sufficient regulation.

Regarding property rights and natural resources, when the Commission had provisionally adopted the draft principles on environmental protection during armed conflict in Part Two, it had chosen not to deal with the issue of natural resources as such. Instead, it had left the matter to be dealt with under the general rules contained in international humanitarian law that dealt with property, public or private, and protection of civilian objects. However, now that the Special Rapporteur had decided to tackle the issue

in relation to the rules on occupation, it might be useful to determine the specific rules that applied in that regard.

The fact that the relevant provisions of international humanitarian law predated developments in the law on the protection of the environment meant that former provisions must be interpreted in light of existing environmental rules and the goal of protection in terms of both the environment and the civilian population. Therefore, while the term "usufruct" was not clear with regard to its current application, it was important to determine the rules in light of the developments in international law. One issue to be considered was the extent, if any, of the authority of the occupying Power to exploit natural resources in the occupied territory. Was such an authority, if it existed, without a limit? General Assembly resolution 1803 (XVII) of 1962 provided for the right of peoples and nations to permanent sovereignty over their natural wealth and resources, which must be exercised in the interest of their development and of the well-being of the people of the State concerned. Such a principle had later been enshrined in article 1 of the International Covenant on Economic, Social and Cultural Rights and had been reaffirmed in numerous United Nations resolutions. Noting that the principle covered not only nations but peoples, and that it had been adopted in the context of decolonization, liberation from alien occupation and independence, he said that to claim that it did not apply to peoples under occupation was an untenable proposition. A number of General Assembly resolutions had been adopted, with an overwhelming majority of States voting in favour, on the permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources. One such resolution had been adopted subsequent to the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, affirming that the construction of the wall in the Occupied Palestinian Territory violated the principle of permanent sovereignty of the Palestinian people over their natural resources. Although the Court had not specifically referred to article 1 of the International Covenant on Economic, Social and Cultural Rights in that case, the Court had stated that the construction of the wall violated the right of the civilian population to work, health, education and an adequate standard of living. The Court had considered that not only the route of the wall, but also the associated regime, consisting of settlement and the policy of transfer of population, violated the exercise of the Palestinian's people's right to self-determination. Furthermore, the rights mentioned by the Court, including to health and to an adequate standard of living, were relevant to the current topic in determining the applicability of environmental protections in occupied territories.

General Assembly resolution 1803 (XVII) was relevant for determining treatment during occupation and the authority of the occupying Power to administer natural resources, including limits on that authority. Exploitation by the occupying Power should be for the benefit of the people under occupation, for their development and their well-being, and was not a licence for the occupying Power to confiscate and requisition such resources or to transfer them to its own population. When the term "usufruct" had been adopted, as part of the Hague Regulations, no such limitations had existed as to the authorities of the occupying Power. However, international law had developed considerably since then and people's rights were now well established, including the right to sovereignty over natural resources. As for the benefit of the people under occupation, a further limitation on the authority of the occupying Power to administer natural resources was the prohibition of pillage — contained both in the Hague Regulations and in the Fourth Geneva Convention, which was applicable especially with regard to non-renewable resources.

Under the Hague Regulations and the Fourth Geneva Convention, the occupying Power had an obligation to apply the national law of the occupied territory and thus observe the existing environmental laws in the occupied territory and to take contrary measures only when necessary for the well-being and civil life of the civilian population. In terms of environmental protection, that interpretation required that environmental measures that benefited the civilian population should be applied in the occupied territories if they exceeded the protection of the environment and natural resources provided for under local law. Such measures could be essential for the social functions and ordinary transactions that constituted daily life in the occupied territory and thus might be applied in spite of the relevant national law. He agreed in that respect with the Special Rapporteur's conclusion in

paragraphs 46 and 50 of the report that the occupying Power must respect the national laws in place in the occupied territory and must also respect the environment of the occupied territory and take environmental considerations into account in the administration of such territory. That position applied to the protection of the environment during armed conflict and by extension to the occupied territories, even without applying the special rules on occupation. Such principles of protection also applied in terms of the interplay between rules of international environmental law and of international humanitarian law on occupation as well as in the exercise of the right to life, health, family life and food in occupied territories. Another relevant principle emanating from the application of international environmental protection was the obligation not to cause significant harm to the environment. That principle of due diligence had been recognized since the *Trail Smelter* case as an integral part of environmental protection. The occupying Power was required to respect that principle in its conduct as the occupied territory was an area under its control.

He agreed with the Special Rapporteur that sustainable use was a policy objective and not a legal principle as such, and that customary and conventional law rights and obligations in relation to the environment could be interpreted in light of that policy objective. He further noted that the occupying Power, as administrator of the occupied territory and its natural resources, should take into account the sustainability of such resources and that utilization was for the benefit of the civilian population.

The law on occupation was part of the law of armed conflict and the principles that applied in phase II, during armed conflict, necessarily applied to occupation. While he agreed in essence with the applicability of the content of draft principles 15, 17, 18 and 19 on situations of occupation, that should not in any way be interpreted to mean that occupation could be considered a post-conflict situation. Such a statement would be dangerous and legally incorrect. Thus, if the commentaries to such principles referred to their applicability in an occupation situation, it would have to be made clear that such applicability did not change the status of the occupied territories or the applicability of international humanitarian law on such territories. He was in favour of referring draft principles 19, 20 and 21 to the Drafting Committee, noting and agreeing with the reformulation of draft principle 19 as suggested by the Special Rapporteur in the oral presentation of her report.

Mr. Jalloh said that he agreed with the Special Rapporteur that the point of departure for the Commission's work on the topic should remain the same as that under the previous Special Rapporteur for the topic, namely, that the Commission did not intend, nor was it in a position, to modify the law of armed conflict. To deviate from that initial approach, when the Commission was so close to completing its work on the topic, could be disruptive or damaging for the Commission and also for States and international organizations that followed the Commission's progress, such as the United Nations Environment Programme. In addition to ensuring coherence with the past work of the Commission, it would keep it from expanding into areas that were for States potentially politically sensitive and complex. The temporal approach used in the Commission's previous work on the topic was a sound way of organizing the draft principles, as environmental damage could occur before, during and after armed conflict. However, he noted and agreed with the previous Special Rapporteur's statement that there could not be a strict dividing line between the different phases, as such a line would not be an accurate reflection of how the relevant legal rules operated.

In the Sixth Committee, while the Member States had generally expressed support for the temporal approach, they had also cautioned that it might become difficult to separate the draft principles into particular phrases of an armed conflict, as some might apply to several phases. The Commission must seek to strike a balance so that the temporal approach was not followed so strictly that it created confusion for States and other users of its work with the introduction of the subject of occupation in the draft principles. Whereas the Special Rapporteur had proposed that the application of the relevant rules on occupation to the previous draft principles might be clarified in the commentaries thereto, he preferred the proposal made by Mr. Park that a more general *mutatis mutandis* clause should be

inserted into the proposed draft principles, possibly under draft principle 19. The issue was too important to be relegated to the commentary.

Turning to substantive matters, he said that, first, as rightly noted in paragraph 13 of the report, the main challenge faced when addressing the protection of the environment under the law of occupation was that the protection afforded was mostly "indirect". The applicable rules could be found in customary international law and widely accepted treaties, including articles 42 to 56 of the Hague Regulations of 1907, articles 27 to 34 and 47 to 78 of the Fourth Geneva Convention of 1949, certain provisions of Additional Protocol I, which dealt with international armed conflicts, and customary international humanitarian law.

Another challenge for the Commission was that, as highlighted in chapter I of the report, many of the instruments in that subfield of the law of armed conflict predated both the emergence of international environmental law as a separate branch of public international law and even the conceptualization of the environment as a subject of legal protection. It might also have been noted in the report that the law of occupation, which had been developed mainly to regulate inter-State relationships and nineteenth-century realities that no longer existed in the twenty-first century, was increasingly under strain. As noted by the International Committee of the Red Cross (ICRC) and States parties to the Geneva Conventions, in several contexts, contemporary occupations had raised a number of important legal questions that were of direct consequence for those living under, and those administering, the occupations. Those questions included when an occupation began and ended, the administration of occupied territories by coalitions, the occupying Power's rights and duties, the use of force in occupied territory and the potential application of occupation law to the administration of foreign territory by the United Nations. All were difficult issues that States, bodies such as ICRC and the United Nations, civil society and academic experts continued to grapple with. In its work on the topic, the Commission should always keep that broader context in mind.

Consequently, while he agreed with the Special Rapporteur that environmental concerns had permeated most areas of international law — as confirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* and as evidenced by the Commission's work on the topic and on related topics, including the topic "Effects of armed conflicts on treaties" — in the limited context of the topic at hand, trying to identify useful principles to protect the environment, the specificities of a situation of occupation and the requirements of the law of occupation might limit the practical application of international environmental obligations. The Commission should remain mindful of that important point throughout its deliberations on the proposed draft principles both in plenary and in the Drafting Committee.

Secondly, regarding the intersectionality of, and complementarity between, protection of the environment and human rights, he personally found the analysis in chapters II and III of the report helpful, although the material might have been easier to digest if the report had more systematically broken down the human rights discussion into the conventional paradigms of civil and political rights, on the one hand, and economic, social and cultural rights, on the other. In any event, he wished to make two brief comments on the substance.

First, he fully endorsed the Special Rapporteur's introductory assertion that it was widely accepted that modern international human rights law continued to apply in armed conflicts and in situations of occupation. The provisions of the International Bill of Human Rights, which included the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, were relevant in that regard, even if humanitarian law sometimes displaced or at least qualified human rights because it was *lex specialis*. The International Court of Justice had confirmed the concurrent application of the two bodies of law in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it had mentioned, in respect of the Occupied Palestinian Territory, that the protection afforded by human rights conventions did not cease in case of armed conflict. The only qualification to that concerned the effect of provisions for derogation, of the kind found in article 4 of the International Covenant on Civil and

Political Rights, though such derogations were limited in time and to the extent strictly required by the exigencies of the situation. In any case, as was widely known, human rights law applied not only in all areas within the territorial jurisdiction of a State but also in respect of the acts of a State outside the four corners of its territory, and particularly in occupied territories, as confirmed by the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. That position found support from treaty bodies such as the Human Rights Committee, in its general comment No. 26, and in a rich body of jurisprudence from regional human rights courts and tribunals in Africa, the Americas and Europe.

Secondly, he agreed with the argument in paragraph 63 of the report that major human rights treaties, which had largely been developed before concern for the environment had taken front and centre, had increasingly been applied in an environmentally friendly way. In that regard, it was true that human rights bodies had been home to a struggle to merge or at least link human rights with environmental concerns, since environmental degradation was often linked to the violation of human rights, including the rights to life, a family life, privacy, health and food. Indeed, as had been rightly observed by the Court of Justice of the Economic Community of West African States in *Serap v. Federal Republic of Nigeria*, in many ways, the quality of human life depended on the quality of the environment. A similar point had been made by the Inter-American Court of Human Rights in *Yanomami v. Brazil* and in its 2018 advisory opinion on the Environment and Human Rights, and by the European Court of Human Rights in *Öneryildiz v. Turkey*.

That said, he understood the Special Rapporteur's decision — announced in paragraph 64 of the report — to focus on "the right to health as one of the closest links between human rights and the protection of the environment". The right to health had been incorporated in both international and regional instruments, including article 25 (1) of the Universal Declaration of Human Rights, which was considered customary law; article 12 of the International Covenant on Economic, Social and Cultural Rights; article 13 of the Convention on the Elimination of All Forms of Discrimination against Women; article 24 of the Convention on the Rights of the Child; article 24 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and article 25 of the Convention on the Rights of Persons with Disabilities. The right to health or to a healthy environment had also been included in article 11 of the American Declaration on the Rights and Duties of Man, article 10 of the Protocol of San Salvador, article 16 of the African Charter on Human and Peoples' Rights, article 14 of the African Charter on the Rights and Welfare of the Child, article 11 of the European Social Charter, articles 38 and 39 of the Arab Charter on Human Rights and paragraph 28 (f) of the Human Rights Declaration of the Association of Southeast Asian Nations.

On the other hand, as the Special Rapporteur herself acknowledged in paragraph 65 of the report, the provisions of the law of occupation concerning health care were "fairly rudimentary". In fact, they consisted mostly of article 56 of the Fourth Geneva Convention, which established the duty of the occupying State of ensuring and maintaining, to the fullest extent of the means available to it, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to measures to combat the spread of contagious diseases and epidemics.

Bearing in mind the aforementioned human rights instruments and the rich body of jurisprudence that incorporated the right to health, he fully agreed with the conclusion reached in paragraph 70 of the report that the close connection between the rights to health and the environment had been acknowledged worldwide and that the obligations of States in that respect were not limited to providing appropriate health care, but also covered protecting the environment. The right to a clean and healthy environment had been deemed particularly important in Africa, as reflected in the decision of the African Commission on Human and Peoples' Rights in the 2001 *Ogoni* case. In the circumstances, it might have been helpful to have a more in-depth analysis of how fundamental human rights in the context of occupation, including, for instance, the right to life, might be affected by environmental degradation. He appreciated, however, that the word limit for the report

might have been a consideration for the Special Rapporteur. In any event, the issue was important and led back to the question of the relationship between human rights law and the law of armed conflict. In that context, it was useful to refer to article 55 of Additional Protocol I, which spoke to both the right to health and the survival of the population. The point could perhaps be satisfactorily addressed in the commentary to the relevant draft principle. That would not only help to strengthen the Commission's work, including the draft principles, but also provide greater added value for States. Focus, in that regard, could be placed on particularly vulnerable populations in the context of environmental degradation and human rights, such as women, children, persons with disabilities and indigenous peoples.

Before making some specific remarks about the draft principles proposed by the Special Rapporteur, he wished to note that Part Four of the draft principles, unlike the provisionally adopted Parts One, Two and Three, lacked a title. He agreed with Mr. Park's proposal that Part Four should be titled "Principles applicable in situations of occupation", which was consistent with the titles of the previous Parts.

With regard to proposed draft principle 19 (1), although he agreed with the Special Rapporteur's substantive point that occupying States should take into account environmental considerations, the paragraph itself was perhaps too vague. The Commission should clarify what it meant to take into account environmental considerations. In so doing, it would establish a clearer principle that could help to set a standard and indicate to any occupying Power or authority the extent to which environmental considerations should be borne in mind. At the very least, the Commission should clarify in the commentaries what standard it was setting, for the benefit of relevant actors. A related concern was whether to use only the word "State", add the words "or international organization" or even use a broader term such as "entity" or "authority" to provide for circumstances in which non-State armed groups exercised effective control over a given area, since effective control was the key test under the law of occupation. The Commission could also opt for a more general formulation, as suggested by some members, that would avoid the loaded terms "territorial State" and "sovereign rights".

In proposed draft principle 19 (2), the Commission might wish to replace the words "respect the legislation" with "respect and enforce the legislation". It was incumbent on occupying Powers to ensure, to the extent possible, a sense of normality in occupied territories, and it was therefore essential that, especially in cases where the occupied territory did not have a strong government or enforcement mechanism of its own, an obligation was imposed on the occupying Power to enforce legislation pertaining to the protection of the environment. Alternatively, the Commission could align its terminology with the standard language used in the law of armed conflict. He had taken note of the proposed redraft mentioned in the Special Rapporteur's oral introduction to her report and viewed it as an improvement on the existing text.

As to proposed draft principle 20, which concerned the administration of natural resources in an occupied territory, he would prefer to follow the position adopted in the Hague Regulations of 1907, but at the same time reflect developments that had occurred since 1907. In that regard, the impact of decolonization could not be ignored, including with respect to the exploitation of the wealth of local populations under occupation or administration and issues of self-determination, which limited the extent to which outsiders could exploit the natural resources of a given society. The Commission had to be crystal clear in the draft principle that the use of natural resources was permissible only for the benefit of the local population, including their enjoyment of a clean and safe environment, and not for the benefit of the occupier or administering authority. In that regard, even though the International Court of Justice had confirmed, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that such resources could be exploited in line with the law of armed conflict, clear limits had to be envisaged. He fully subscribed to the legal arguments put forward by Mr. Hmoud with respect to the issue of self-determination and the question of permanent sovereignty over natural resources.

The words "minimizes environmental harm" could be interpreted in at least two ways. First, as meaning that an occupying Power should, in one way or another, reduce the

environmental harm that could result from its administration of natural resources or, secondly, as meaning that an occupying Power should choose to administer natural resources in a way that caused as little environmental harm as possible. The second option was, in his view, preferable, as the Commission would be setting a higher standard for occupying Powers in terms of the respect due to the resources of occupied territories.

Finally, he agreed with the substance of proposed draft principle 21, which addressed the obligation of due diligence. He supported the suggestion of other members, including Ms. Galvão Teles, to hew closer to the language used by the International Court of Justice in paragraph 29 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in order to produce a more general formulation than had initially been proposed in the report. The formulation could be clarified in the commentary, as could some of the specific language put forward by the Special Rapporteur.

Turning to the issue of future work, he noted that the Special Rapporteur indicated in paragraph 100 of the report that the second report, to be submitted in 2019, would address questions related to the protection of the environment in non-international armed conflicts. The Commission had not distinguished between international and non-international armed conflicts in the draft principles that it had provisionally adopted. The matter had been discussed in the Sixth Committee, with some States asserting that the draft principles should not address non-international conflicts, others asserting the opposite, and yet others asking for clarification as to which draft principles applied to both international and non-international armed conflicts. In accordance with the jurisprudence of the International Tribunal for the Former Yugoslavia in, among other cases, *Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-A*, which noted an intermediate situation in which a conflict could be partly international and partly non-international, he was not convinced that it would be a helpful distinction to make in the particular context of environmental protection. His key concern was that the Commission should avoid creating a bifurcated system, such as that found in the law of armed conflict, that afforded stronger protection for international armed conflicts than for non-international armed conflicts, particularly given that most modern-day conflicts were classed as non-international. Drawing a distinction might also force the Commission to contemplate the role of non-State actors, who sometimes occupied, and exercised effective control over, a given area. What would be the scope of the obligations imposed on those actors, if any, or on the States whose former territory they occupied?

Having taken into account the content of the report and the statements and suggestions of other members, he supported the referral of all the proposed draft principles to the Drafting Committee for further review and improvement.

Mr. Hassouna said that he wished to thank the Special Rapporteur for preparing and introducing to the Commission her first report on the topic "Protection of the environment in relation to armed conflicts", which built on the reports of her predecessor in the role, Ms. Jacobsson. Despite the difficulty of taking over a topic on which work had already begun, the Special Rapporteur had forged new ground while retaining the temporal approach used in previous reports, which would allow for a cohesive and comprehensive study. The topic remained vital and urgent, as evidenced by the inclusion of an article on armed conflicts in the preliminary draft of the Global Pact for the Environment, namely article 19, which stipulated that "States shall take pursuant to their obligations under international law all feasible measures to protect the environment in relation to armed conflicts".

The substance of the Special Rapporteur's report clearly demonstrated that the topic lay at the intersection of various existing international law regimes, where there existed several similar and overlapping concepts and principles. In her approach to the topic, the Special Rapporteur had successfully analysed and coordinated those principles with a view to applying them to the protection of the environment in relation to occupation. He welcomed the Special Rapporteur's consultations on the topic with other entities, such as ICRC, the United Nations Educational, Scientific and Cultural Organization and the United Nations Environment Programme, and with regional organizations. The work of those organizations was of particular relevance and importance, given that they operated at the intersection of such different fields of international law.

He wished to make a number of general comments about the report. First, many of the sources relied upon by the Special Rapporteur in her analysis were United Nations organizations and Western scholars. It would have been desirable to include sources from a wider variety of regions. In chapter I, in particular, it would have been valuable to take into account the opinions and publications of regional organizations other than the European Union. Those organizations had a more immediate experience of armed conflicts or occupations in their respective regions and, by extension, a better understanding of their history and legal implications.

Secondly, the number of States that had contributed to the most recent debate on the topic in the Sixth Committee had continued to be low, and it was unfortunate that there had once again been no African States among them. The Special Rapporteur's report would hopefully spark greater interest in what was an important topic.

Thirdly, the Special Rapporteur's proposed draft principles addressed the environmental protection obligations of occupying States. While draft principle 19 laid down a case-dependent obligation to take environmental considerations into account and respect existing legislation, the other two draft principles were universal. Draft principle 20 imposed an obligation to use natural resources sustainably, and draft principle 21 dealt with the issue of transboundary harm. All three draft principles flowed from chapter III of the report. The Special Rapporteur had not yet proposed draft principles based on the indirect protection of the environment provided for in the law of occupation, or on the protection of the environment through international human rights law. The result could be described as an underemphasis of the well-being of populations under occupation, which was a central feature of international humanitarian law, human rights law and international environmental law. While the Special Rapporteur noted, in paragraph 28, that the underlying rationale of provisions of the law of occupation was "to ensure property and exploitation rights and economic interests, or the survival and welfare of the civilian population, as the case may be", it would have been more emphatic to assert that "the well-being of an individual is the ultimate object of all law". In that regard, the Special Rapporteur could take guidance from article 1 of the preliminary draft of the Global Pact for the Environment, which established that "every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment". The notion of "dignity" was particularly important in that context.

The structure of the report would benefit from placing each proposed draft principle at the end of the discussion supporting its inclusion, rather than at the end of the report. Doing so would make it easier for the reader to understand the rationale behind each proposed draft principle and improve the overall flow of the report.

Fourthly, the concept of "protecting Power" under the Geneva Conventions should be clarified. According to article 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), parties to a conflict could designate a protecting Power to secure the supervision and implementation of the Geneva Conventions. A protecting Power could be a third State. In certain cases, ICRC or any other organization that "offers all guarantees of impartiality and efficacy" could act as a substitute. The rights and obligations of protecting Powers in situations of occupation should therefore be defined in the commentary.

There had been situations, when the United Nations had been conferred the administration of a territory, as in the cases of the United Nations Interim Administration Mission in Kosovo and the Kosovo Force, in which an international organization had been deployed in the territory of a foreign country and had exercised complete control over that territory. Although the international organization had not been an occupying Power *per se*, it had carried out functions of an occupying Power. Future work on the topic should address the legal implications of international organizations acting in such a role.

Fifthly, the report did not elaborate on the various forms of occupation. As stated in paragraph 45 of the report, "the longer the occupation lasts, the more evident is the need for some changes … to allow the occupying State to fulfil its duties under the occupation law". The question of whether and how the obligation to protect the environment changed

depending on the nature of the occupation — temporary or prolonged, total or partial, direct or by proxy — was a matter of great importance, given the variety of occupations in different world regions. He recognized that, because of the controversial and politicized nature of the issue, it was difficult to provide a definition of occupation beyond that found in article 42 of the Hague Regulations of 1907, which was cited in paragraph 20 of the report. However, it should be acknowledged in the commentaries that the definition had been further developed by the International Tribunal for the Former Yugoslavia in *Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-A* to cover contemporary forms of occupation, as noted in paragraph 25 of the report.

Proposed draft principle 19 was based on article 43 of the Hague Regulations, as explained in paragraphs 43 to 50 of the report. Proposed draft principle 19 (1) did not have the same grounding in the Hague Regulations as 19 (2), yet it found support in international human rights law, as discussed in chapter II of the report. In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had interpreted article 43 of the Hague Regulations as requiring occupying States "to secure respect for the applicable rules of international human rights law and international humanitarian law". In that regard, relevant economic, social and cultural rights, such as the rights to food, water and health, were interrelated with the protection of the environment. The right to food, for example, was reinforced in article 55 of the Fourth Geneva Convention, under which "the Occupying Power has the duty of ensuring the food and medical supplies of the population". According to paragraph 8 of general comment No. 12 of the Committee on Economic, Social and Cultural Rights, the right to adequate food implied the accessibility of such food "in ways that are sustainable and that do not interfere with the enjoyment of other human rights".

The right to water was essential for the full enjoyment of life and all human rights. Safe, physically accessible, and affordable water was of the utmost importance in regions experiencing water scarcity. As stated by the High Court of South Africa, "one cannot speak of a dignified human existence if one is denied access to water". The protection of the rights to food, water and health, which were inherently connected to the protection of the environment, was certainly necessary to preserve the well-being of an occupied population. Consequently, proposed draft principle 19 (1) was a logical development from established international human rights norms.

The Special Rapporteur's suggested revisions to proposed draft principle 19 (1) were largely acceptable, though the reference to "environmental considerations" could be made more specific. The Special Rapporteur noted that the term was drawn from the Permanent Court of Arbitration's decision in the *Iron Rhine Railway* case, but that decision had also involved the explicit application of "principles of environmental law". An allusion to those principles would give States more guidance than a simple reference to environmental "considerations".

Furthermore, the words "including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights" at the end of draft principle 19 (1) might be unnecessary. During situations of military occupation of a continental territory, the occupying State's "effective control" extended to adjacent maritime areas, covering "gulfs, bays, roadsteads, ports, and territorial waters", as stated in article 88 of the Oxford *Manual of the Laws of Naval War*. In such situations, occupation of both maritime and continental territories was subject to articles 42 to 56 of the Hague Regulations. It would be sufficient for the obligations to protect the environment, both on land and in maritime areas, to be discussed in the commentary to draft principle 19 (1), and for it to be noted that effective control did not extend to waters outside the sovereign territory of the occupied State.

The language of proposed draft principle 19 (2) closely tracked that of article 43 of the Hague Regulations, which should be uncontroversial considering the customary nature of that article. Despite imposing a strictly worded obligation to respect national laws "unless absolutely prevented", the article allowed an occupying Power to legislate in the occupied territory when necessary for the maintenance of public order and civil life. The commentary to draft principle 19 (2) should reflect that wide degree of latitude afforded to States, while also stressing that an occupying Power's legislative authority was grounded in

the need to serve the interests of the occupied population and maintain the *status quo ante* in view of the temporary nature of the occupation. As noted in the commentary to the Hague Regulations, occupation was an exceptional situation that should come to an end sooner or later, hopefully through peaceful means, allowing the occupied population to determine their own future.

In addition to national legislation, draft principle 19 (2) should reference environmental obligations under customary international law, treaty obligations and local custom. Although it was stated, in paragraph 49 of the report, that "the extent to which [the occupying State] may provide protection to the environment depends on how effectively the environment and natural resources are protected in national legislation", there were additional sources of obligations that continued to bind States during situations of occupation. As acknowledged elsewhere in the report, the occupying State, unless absolutely prevented, must also respect obligations imposed on all States as a matter of customary international law. For example, the Special Rapporteur acknowledged that customary international environmental law continued to apply in situations of armed conflict in paragraphs 77, 79 and 80 of the report, citing the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict and the International Court of Justice's 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Though such obligations were necessarily limited by the law of armed conflict and the law of occupation, there was, at a minimum, an obligation to consider environmental factors in the context of the rules of armed conflict. Any addition to draft principle 19 (2) should be worded carefully, with due attention paid to the conservationist principle.

The relevance of treaty obligations and local custom that had not become a part of national law should also be considered. Proposed draft principle 19 (2) might therefore be reworded to include those additional sources of international obligations, or a new paragraph 3 could be inserted to address obligations stemming from customary international law and local custom.

Proposed draft principle 20 reflected the principle of "sustainable use of natural resources", which, according to the Special Rapporteur, was "one of the most established components of sustainable development in international law." While the Special Rapporteur explained that sustainable development was recognized as a "policy objective", which the International Court of Justice had not recognized as a principle of international law, the use of the word "shall" in the proposed draft principle suggested that it was a legal obligation for States.

Thus, according to the report, a legal obligation of sustainable use existed even though its overarching principle of sustainable development had not achieved that threshold. The Special Rapporteur innovatively argued that sustainable use provided the modern equivalent of "usufruct". However, under the Hague Regulations usufruct was "a broad principle that does not entail specific obligations for occupying States." In paragraph 91 of the report, the Special Rapporteur cited the occupation of Japan following the Second World War as an example of State practice. More State practice would be needed to substantiate the proposed link between the two concepts.

The Special Rapporteur's analysis of usufruct and sustainable use contained in the report would take on even greater importance in any future report on non-international armed conflicts because, as noted by the United Nations Environment Programme, the regulations attached to the special status of occupation, such as qualifying the occupants as "usufructuary", offered some guiding principles for dealing with similar situations in the context of non-international armed conflict, in which the over-extraction and depletion of valuable natural resources was a common feature.

If the Special Rapporteur's argument linking usufruct and sustainable use was accepted, the report's use of the word "minimize" rather than "avoid" in the report should be queried. It had been pointed out in the Sixth Committee debate in the context of draft principle 9 that "the preventive measures should seek not only to minimize but also to avoid damage" to the environment. The issue could be discussed in the Drafting Committee.

Additionally, it should be clarified why the proposed draft principle applied only to the administration of natural resources, to the exclusion of human-made and non-renewable natural resources, which might also be used in an unsustainable fashion that harmed the environment. As it stood, proposed draft principle 20 could be read as accepting the use of oil or infrastructure without regard to minimizing or avoiding environmental harm. The title of draft principle 20 could reflect its intended application, whether limited to the principle of the "sustainable use of natural resources" or covering additional types of resources. Furthermore, the commentary should reflect the importance of sustainable use for the benefit of present and future generations of the occupied population.

Proposed draft principle 21 was based on the fundamental principle of "no harm" or due diligence, which was well established in judicial decisions, treaties and customary international law and was contained in principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and principle 2 of the 1992 Rio Declaration on Environment and Development (Rio Declaration). The Special Rapporteur provided a convincing argument for extending those obligations to situations of occupation in paragraphs 81 to 86 of the report. Where a State was exercising effective control over a territory, the obligation to respect the environment of other States or areas beyond national jurisdiction applied.

However, the wording of proposed draft principle 21 diverged from the Stockholm and Rio Declarations. While those texts referred to a State's "responsibility to ensure" that activities did not cause environmental damage, proposed draft principle 21 referred to a State using "all the means at its disposal". Alternatively, article 3 of the Commission's adopted articles on prevention of transboundary harm from hazardous activities stated that the State of origin should "take all appropriate measures to prevent significant transboundary harm or, at any event, to minimize the risk thereof".

The report's phrasing imposed a more substantial obligation upon States by requiring them to use "all means at [their] disposal," a phrasing which was derived from the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*). However, while that judgment had indicated that such means were needed to avoid causing damage to the environment, proposed draft principle 21 established a stronger obligation to use such means to ensure that activities did not damage the environment.

In his opinion, the Commission should either use wording consistent with existing international obligations, such as that contained in the Stockholm and Rio Declarations, or with previous adopted work of the Commission, or explain the reasons for deviating from the widely accepted language of the aforementioned texts.

The due diligence principle should also be considered outside of the context of occupation, as it applied to armed conflicts generally. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control was now part of the corpus of international law relating to the environment. The advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* recognized that the issue was not whether the treaties relating to the protection of the environment were or were not applicable during an armed conflict, but rather whether the obligations stemming from those treaties were intended to be obligations of total restraint during military conflict. That had been the opinion of the Court. The Drafting Committee might consider expanding the scope of proposed draft principle 21 to all armed conflicts, while including in the commentary its applicability to situations of occupation.

In relation to future work, the Special Rapporteur indicated that her Second Report would address questions related to responsibility and liability for environmental harm in relation to armed conflicts. That should be welcomed. She might also consider the relevance of compensation and reparations for damage caused to the environment, as well as methods for dispute settlement in that regard. The Special Rapporteur could further consider the obligation contained in common article 1 of the Geneva Conventions, which stated that parties should "undertake to respect and to ensure respect" for the Conventions. It was widely accepted that such an obligation bound all States parties and competent

international organizations to ensure universal compliance with the humanitarian principles underlying the Conventions might also be relevant.

Also to be considered in the next report was the protection of the environment in relation to non-international conflicts. The subject of such conflicts had already drawn reactions from States. While some Members States in the Sixth Committee had supported such a discussion, others had expressed hesitation and cautioned against its inclusion. In his view, non-international armed conflicts should be addressed as part of the topic, given that most armed conflicts in the modern world were of a non-international character. The matter should, however, be addressed with caution in view of the complexities involved.

In conclusion, he said that there could be no better testimony to the importance of protecting the environment in an armed conflict than the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. In that opinion, the Court had recognized that the environment was not an abstraction, but represented the living space, the quality of life and the very health of human beings, including generations unborn.

That approach had been further recognized in article 30 of the Charter on Economic Rights and Duties of States, the predecessor instrument to the above-cited sources, which stipulated that "the protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States".

Finally, he wished to recall a principle that dated back to the mandatory system under the League of Nations and quoted in the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, namely that the well-being and development of people not able to govern themselves formed "a sacred trust of civilization".

In light of the aforementioned comments, all three draft principles should be referred to the Drafting Committee. He was pleased that no member of the Commission had opposed referral of all the proposed draft principles to the Drafting Committee, which had often not been the case with regard to other topics. The Drafting Committee should give a title to Part Four and the three proposed draft principles so as to be consistent with the structure of the rest of the draft principles and to help clarify in what context they were relevant.

Mr. Saboia said that he wished to congratulate the Special Rapporteur on her excellent report, which drew a clear and richly documented analysis of the ways in which occupation — in its different aspects — might affect the protection of the environment in occupied territories. On the basis of that analysis the report proposed three draft principles. She had undertaken a careful study of the law of occupation, a branch of the law of armed conflicts, in order to identify legal concepts capable of helping in the effort to develop legal standards for the protection of the environment in such a situation.

Chapter I, part A, of the report addressed the concept of occupation, starting from the established understanding of the concept of occupation expressed in article 42 of the Hague Regulations of 1907. The elements and the main characteristics of occupation — namely the existence of effective control by the occupant — as well as the different phases and certain aspects concerning the status of occupied territories which were still controversial were dealt with clearly in paragraphs 19 to 26, supported by reference to case law of the International Court of Justice, the European Court of Human Rights and the International Tribunal for the Former Yugoslavia.

As stated in paragraph 20 of the report, while the 1907 definition was based on the classic notion of belligerent occupation, it now covered a wide range of cases in which the armed forces of a State, or of several States, exercised authority, on a temporary basis, over inhabited territory outside the occupied frontiers of their State. The 1949 Fourth Geneva Convention was equally relevant, particularly its Part III, entitled "Occupied Territories". Additional Protocol I of 1977 also applied in relation to occupied territories.

As to whether the term "occupation" should be defined in the context of the draft principles, he favoured recourse to a limited number of definitions, such as "armed conflict" and "environment", which had already been provisionally adopted. Those two

definitions were based on previous work of the Commission. Addressing the definition of "occupation", which was a central subject of the law of armed conflict, would perhaps go a step beyond the scope of the topic.

Noting that the legal regime of occupation had developed in a period that predated the notion of environment, he said that part B of chapter I showed how certain concepts, mostly regarding property rights, had made it possible to address the protection of natural resources and the environment in the context of the law of occupation. The occupying State was defined in that legal context as a "temporary administrator" of public immovable property. While entitled to use the products of the property, it must preserve the capital and avoid depletion of the resources. Its relationship with that extensive definition of property had been defined as "usufruct". That old concept of Roman law existed in Brazilian law, both in private law where individuals could contract such a relationship related to property rights, and in public law, the most interesting example of which was the permanent usufruct recognized by the Constitution to Brazilian indigenous peoples regarding the lands they traditionally occupied.

Paragraphs 32 to 35 of the report contained a discussion of how the principle of people's permanent sovereignty over natural resources had influenced the contemporaneous interpretation of the law of occupation. The principle, which was enshrined in both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, had been proclaimed repeatedly in General Assembly and Security Council resolutions and had been recognized as customary law by the International Court of Justice in the *Armed Activities on the Territory of the Congo* case.

The principle of self-determination was addressed in paragraph 35 of the report. In that context, it was important to stress recognition of the right to self-determination of peoples under occupation and the relation between it and their right to access to and enjoyment of their natural resources, as well as the limitations and obligations incumbent upon the occupying State. That was particularly important in the case of territories that were not part of any established State. Regarding one such territory, the Occupied Palestinian Territory, the International Court of Justice, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, had stated that the construction of a wall and other measures by the occupying State, "severely impede the exercise by the Palestinian people of its right to self-determination".

Other relevant advisory opinions of the Court were the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and *Western Sahara*. In the *East Timor (Portugal v. Australia)* case of 1995, the Court had affirmed the *erga omnes* nature of the principle of self-determination. The merits of the case, although not adjudicated by the Court, deserved mention, as they were related to matters of access by East Timor to the important oil resources of the Timor Gap.

The conditions and the extent to which an occupying State could seize, use and exploit property in an occupied territory depended on whether the property was public or private, movable or immovable. Some controversy existed regarding the categorization of crude oil as movable or immovable property but, as explained in paragraph 38 of the report, the question of whether the resource concerned bore a necessary connection to military operations was an important consideration.

Private property enjoyed broader protection than public property, a factor that could provide further protection to the environment and natural resources against the negative effects of occupation. Besides the Hague Regulations, provisions establishing limitations that afforded protection to the environment were to be found in the Fourth Geneva Convention. "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" was defined as grave breaches in the Convention and as a war crime of "pillage" under the Rome Statute of the International Criminal Court. Additional Protocol I provided other grounds for protection of the environment in general.

Chapter I, part C, addressed the question of how the powers and obligations of the occupying State were to be exercised with a view to discharging its duty to maintain, to the extent possible, public order and civil life. According to the Hague Regulations and the

Fourth Geneva Convention, the power of the occupying State in terms of legislation and public policy were to be balanced against the need not to alter significantly the economic and social life of the occupied territory. Currently, however, it was accepted that the occupying State could have a broader mandate to legislate in order to maintain public order and civil life and to change legislation that was contrary to established human rights standards. However, there should be limits to the use of those powers, and the so-called "transformative occupation" was a controversial concept.

In paragraph 50, the Special Rapporteur drew her concluding remarks to chapter I of the report stating that the occupying State had a general obligation to respect the environment of the occupied territory and to take environmental considerations into account in its administration of such territory. Environmental protection was an essential function of the State as it ensured the welfare of the population. He endorsed the statement in the paragraph that the obligation to protect the environment was also supported by human rights law, given the close link between key human rights such as the right to food, health and life and the protection of the environment.

The applicability of human rights law during armed conflict and occupation, in line with the well-known statements by the International Court of Justice and other international and regional courts, was reaffirmed in the report. Other relevant materials were mentioned, such as the important pronouncement of the Human Rights Committee that "the protection of the rights under the International Covenant on Civil and Political Rights, once accorded, devolves with territory and continues to belong to the people, notwithstanding any changes in the administrations of that territory." As noted by the Special Rapporteur, following an analysis of judgments of the International Tribunal for the Former Yugoslavia and the European Court of Human Rights, "human rights law not only applies to situations of occupation but seems moreover to play a more important role during the occupation than in the phase of hostilities".

Chapter II, part B, of the report was devoted to the environment and human rights. The connection between human rights and the protection of the environment was widely recognized, as shown by the authorities quoted in the introductory paragraphs of the chapter. Particular emphasis was placed on the right to health, which was broadly considered to have a very close connection with the environment. The human rights courts and treaty bodies, with their experience in processing individual complaints, had played a special role in consolidating those notions and ensuring protection and redress to affected parties.

A slight correction was required in the report regarding the mention, in footnote 246 on page 33, of the *Yanomami v. Brazil* case. Although quoted as being a case before the Inter-American Court of Human Rights, it was actually a complaint dealt with in the context of the Inter-American Commission on Human Rights, which was part of the inter-American human rights system but was not a judicial body. At the time of the case in 1985, Brazil had not yet recognized the contentious competence of the Court, a step it was to take in 1992. It must, however, be recognized that the dialogue between the Commission and Brazil had produced positive results and contributed to consolidating the understanding of the connection between the right to life and a healthy environment.

As noted by the Special Rapporteur, the provisions of the law of occupation concerning health were "fairly rudimentary" and focused mostly on the immediate concerns resulting from hostilities. Nevertheless, the occupying State, as soon as the situation stabilized, must pay attention to the more long-term needs of public health. The report listed the human rights instruments and case law that established relationships between human rights, notably the right to health, and the protection of the environment.

Paragraph 71 to 76 dealt with the question of how to assess the conduct of the occupying State in terms of its obligations with regard to the human right to health and the related duty of protection of the environment. As was noted, those obligations might be subject to restrictions and limitations in line with the law of occupation.

The conclusions drawn in paragraphs 73 to 76 of the report addressed the responsibility of the occupying State according to the different phases of the conflict. He could accept that approach, but it had limitations, as there were health situations that might

take on catastrophic dimensions and require immediate attention. While it was reasonable to think that an occupying State was not required to engage in positive formulation of environmental policies, to state its obligation solely in terms of refraining from acts that caused significant harm to the environment and public health fell short in his view of the standard set by international law even during occupation. Recognizing, as the report did in paragraph 74, that the "public health priorities of the occupying State could include protection of the population from the adverse health effects of pollution through toxic substances, water or oil pollution, or other health risks, related to environmental damage resulting from the armed conflict" was a more positive approach. After a very good analysis, the final part of the conclusions failed to adequately assess the right to health and protection of the environment from a human rights perspective, even under situations of occupation.

While he agreed with the three proposed draft principles and supported their referral to the Drafting Committee, he regretted that the Special Rapporteur had not found it appropriate to propose a draft principle on the relationship between human rights and occupation. There was enough material in her report to substantiate a draft principle, which could in particular emphasize the right to health and its relationship to the environment. He agreed with the statement made earlier by Mr. Hassouna in that connection, proposing that a draft principle on human rights and the environment should be developed. If there was support for the idea, the resulting draft principle could be a provision of significant interest in the context of situations of occupation.

He agreed with the Special Rapporteur's remarks concerning her future work and the possible conclusion of the first reading of the topic in 2019, as well as the points made concerning the existing draft principles and their relationship with the issue of occupation.

The meeting rose at 11.55 a.m. to enable the enlarged Bureau to meet.

Provisional

For participants only

3 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3429th meeting
Held at the Palais des Nations, Geneva, on Friday, 13 July 2018, at 10 a.m.

Contents

Organization of the work of the session (*continued*)

Protection of the environment in relation to armed conflicts (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagayno

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair drew attention to the programme of work proposed by the Bureau for the remainder of the Commission's seventieth session. He said he took it that the Commission wished to approve that programme.

It was so decided.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

The Chair invited the Commission to resume its consideration of the first report of the Special Rapporteur on protection of the environment in relation to armed conflicts.

Mr. Nolte said he agreed with the Special Rapporteur that the protection of the environment in situations of occupation resulted from an interplay of the law of occupation, international human rights law and international environmental law, where the law of occupation functioned as *lex specialis*. He was also in favour of the Special Rapporteur's proposal to draft principles formulated in general terms applicable to all forms of occupation. It could be made clear in the commentary that the exact scope of a particular obligation would depend on the nature and duration of the occupation. He concurred that the meaning of some terms of the law of occupation could evolve over time.

He supported the contents of draft principle 19 (1), as reformulated by the Special Rapporteur in her oral presentation. The terms "environmental considerations" could be further elaborated in the commentary, along with "administration", which might include the exercise of delegated authority by private actors. While he basically agreed with paragraph 2, he wondered whether it should not also require the occupying Power to respect the occupied State's international legal obligations with regard to environmental protection. As it stood, that paragraph tracked article 43 of the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) of 1907 and article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), both of which reflected the conservationist principle which, at that juncture, had sought primarily to preserve domestic law, whereas environmental protection was currently shaped by international agreements as well. Even though the word "legislation" might be construed as including international legal obligations, it might be advisable to insert the phrase "and its international obligations" after "legislation".

Like Mr. Hassouna, he thought that draft principle 19 could be strengthened by inserting a third paragraph along the lines of the second paragraph of guideline (5) of the Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, so that it would read: "Obligations of the occupying State under international agreements and customary law pertaining to the protection of the environment may continue to be applicable in situations of occupation to the extent that they are not inconsistent with the applicable law of armed conflict." That wording would be in line with the Commission's draft articles on the effects of armed conflicts on treaties, draft articles 6 and 7 and annex (g) to (i) of which carried an implication that treaties on environmental protection continued in operation, in whole or in part, during armed conflict.

While he generally endorsed draft principle 20, it might be advisable to recast it slightly since, as the Special Rapporteur had acknowledged in paragraphs 93, 94 and 97, the legal value and exact content of the term "sustainable use" was controversial. In many of the cases quoted in paragraph 95, where international courts or tribunals had referred to that term, they either did not attach a specific legal value to it, or it was used in the context of a treaty containing it. The relationship between draft principles 20 and 19 (1) was also questionable, especially with regard to usufruct. As the Special Rapporteur had indicated, some of the possible interpretations of "sustainable use" regarded it as a broader concept than the concretization of usufruct.

Nevertheless, he was in favour of retaining the term "sustainable use" because it had been employed, in terms of "sustainable development", by the International Court of Justice

in *Gabčíkovo-Nagymaros (Hungary v. Slovakia)* and in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. The Court had considered it to be an apt expression of the need to reconcile economic development and the protection of the environment. The notion itself and its underlying rationale were also applicable in a situation of occupation. Furthermore, the need to balance economic development against other objectives in a situation of occupation had been reflected in the rules on usufruct in article 55 of the Hague Regulations. The Special Rapporteur was correct in contending that the term "sustainable use" was the modern equivalent of usufruct. The principle of usufruct predated most norms of international environmental law, but in the shape of "sustainable development" it was sufficiently broad to accommodate legal developments since 1907, including the right to retain permanent sovereignty over natural resources. Paragraphs 97 and 98 of the report provided excellent guidance on how the term "sustainable use" should be used in the context of the topic under consideration. However, in order to meet the concerns of some members, the Special Rapporteur should further clarify its meaning in the commentary. It should be interpreted in light of the right to permanent sovereignty over natural resources as permitting the exploitation of natural resources solely "for the benefit of the population". That position was corroborated by paragraph 249 of the 2005 judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.

While he generally agreed with the formulation of draft principle 21, which was apparently drawn partly from the judgment in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the wording "damage to ... areas beyond national jurisdiction" seemed somewhat unusual, as he was unsure whether an "area" as such could be damaged. It was also unclear why the Special Rapporteur proposed the term "significant damage" rather than the more widely used term "significant harm". "Significant damage" was normally used in the contexts of attribution and compensation, whereas "significant harm" was contained in many texts, including the Commission's articles on prevention of transboundary harm from hazardous activities and the judgment of the International Court of Justice in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The proposal made by Ms. Galvão Teles to consider wording taken from the last sentence of paragraph 29 of the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* merited further examination.

Lastly, he recommended referring all three draft principles proposed in the report to the Drafting Committee.

Mr. Petrič said that the Commission must be mindful of the fact that the nature of conflicts and occupation had altered since the adoption of the Hague Regulations in 1907 and the Fourth Geneva Convention in 1949. The use of armed force by States had been prohibited by international law and, for that reason, occupation resulting from any such use of force, save in cases of self-defence or when authorized by the Security Council, was illegal and could not give rise to any rights, under the principle of *ex injuria jus non oritur*. The population of an occupied territory was therefore entitled to resist the illegal rule of the occupying Power, as its administration was inconsistent with self-determination.

While he was not opposed to the Special Rapporteur's approach or the draft principles which she had proposed, he wondered why she had failed to make any reference to the illegality of occupation, since that might have a bearing on the legal aspects of protection of the environment in a situation of occupation. That issue should be dealt with at least in the commentary.

More research was needed into treating the protection of property as an indirect means of protecting the environment, as a distinction should be drawn between private property and State-owned property. Moreover, in the Second World War, the population of occupied territory had resisted by destroying property, infrastructure and food. Such action could probably not be deemed unlawful under contemporary international law of occupation.

The Special Rapporteur had taken the view that the principle of self-determination could be invoked in relation to the exploitation of natural resources in occupied territories and had based her reasoning on the findings of the International Court of Justice in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied*

Palestinian Territory. However, it was not clear what constituted the substance of the right to self-determination, what its relationship was with other principles embodied in the Charter of the United Nations, what its scope was, or how it could be implemented. He therefore agreed with Mr. Rajput's observations in regard to self-determination and the exploitation of natural resources in the context of occupation.

On the other hand, he was very much in favour of approaching the topic via human rights law. Human rights, including those connected with the environment, certainly applied in the event of armed conflict and occupation. The occupying Power was bound to protect the human rights existing in the occupied territory before occupation and it was also bound by its own human rights obligations. In the case of lengthy occupation, the issue of the standard of human rights protection might arise if the occupying Power's standard of human rights and environmental protection was higher than that of the sovereign State of the occupied territory. He agreed with the distinction drawn by Mr. Murase between belligerent occupation and long-lasting stable occupation. That was indeed a matter which should be elucidated in the commentary.

As events in Kosovo, Iraq, Afghanistan, or even Korea, had shown, the North Atlantic Treaty Organization (NATO) or other entities or forces acting under the authority of a Security Council resolution could function *de jure* or *de facto* as occupying Powers. That meant that the legal aspects of environmental protection during occupation also had implications for international organizations, which should be spelled out at least in the commentary.

Turning to the draft principles themselves, he considered that it might be useful to add an introductory draft principle to part four stating that in all cases of occupation, the existing rules of international law concerning the protection of the environment must be respected. A principle or a commentary should define what was meant by occupation in the context of the topic. It would be wrong to restrict protection of the environment to cases of classical occupation covered by the Hague Regulations or the Geneva Conventions relating to the protection of victims of international armed conflicts. The phrase "or any other occupying actor" should be added after the words "occupying State" where appropriate in the draft principles, or at least in the commentary thereto. Attention should also be drawn in the commentary to the distinction between legal occupation resulting from the lawful use of armed force authorized by the Security Council or in exercise of the right of self-defence and illegal occupation following the unlawful use of armed force in violation of *jus cogens*.

He welcomed the plan for future work, as the problems arising in non-international armed conflicts were extremely relevant to the Commission's work and required in-depth study. Matters related to responsibility and liability for environmental harm caused by armed conflicts were of central importance to the topic. It would certainly be very helpful to have a preamble and some definitions.

He was in favour of referring all the draft principles to the Drafting Committee on the understanding that the version of draft principle 19 would be that proposed by the Special Rapporteur in her oral presentation.

Sir Michael Wood, while agreeing with much that had been said by Mr. Park, Mr. Murase, Mr. Murphy and others, said that he disagreed with some of the more far-reaching proposals made. He would like to emphasize that the topic did not concern occupation in the broadest sense, but the protection of the environment in relation to armed conflict.

Chapters I, II and III of the Special Rapporteur's first report included an elaborate treatment of some major issues that extended well beyond the present topic: international humanitarian law applicable in occupied territories in the widest sense, going far beyond environmental aspects; the law of occupation, which was part of the law of armed conflict; the relationship between international humanitarian law and international human rights law, which was a vast subject; and whether the conventional and customary rules of international law relating to the environment were applicable to situations of occupation. It was not always obvious which paragraphs of the report were specifically relevant to the three relatively modest draft principles proposed; it would be important to be clear about that when drafting the associated commentaries. It was to be hoped that the commentaries

would be short and would focus on explaining the wording of the draft principles, without seeking to expand on broader issues.

On a related note, it was sometimes far from obvious how some of the situations referred to by previous speakers were relevant to the topic. Some speakers had mentioned various situations, past and present, either to illustrate a point, or more often — it seemed — simply to mention them. In some cases it was far from obvious how far the situations referred to were relevant to the current topic. Disputed territory was not the same as occupied territory.

As to the scope of the topic, Mr. Murase had clearly explained the distinction between belligerent and pacific occupation. While politicians might prefer to avoid the words "belligerent occupation", it was the correct term in law and was covered by the topic as an element of armed conflict. Whether the topic should be extended to cover other situations that could be loosely referred to as occupation despite being removed from armed conflict, such as the situation in Kosovo pursuant to resolutions of the United Nations Security Council, was less obvious. The major issue of what was meant by "environment" in the context of the topic had also been left open for the time being; whatever definition was used, however, references to whether an occupying Power could increase oil consumption, or to the protection of private property, might be out of place.

He agreed with those who had questioned how realistic it was to expect peacetime obligations and standards relating to the environment and human rights to be applied in time of belligerent occupation, where the primary obligation was to ensure, as far as possible, public order and safety. Some of the ideas advanced ignored even such basic principles of the law of armed conflict as military necessity. The Special Rapporteur's more modest approach was preferable.

The rationale underlying draft principle 19, as set out in the report, was sound, but it would be useful if the Special Rapporteur, in summing up, could expand on the origin of her new proposed wording and its implications. The notion of a "general" obligation was not entirely clear, and it might be more appropriate to word the draft principle such that the occupying Power "should" respect the environment. Environmental considerations should clearly be taken into account by the occupying Power in respect of the occupied territory, but what that meant in practice would need to be determined case by case. The express reference to "any adjacent maritime areas" was unnecessary and potentially incorrect. Whether such areas fell within the occupied territory or not was essentially a question of fact and could be explained in the commentary. The Drafting Committee would need to consider paragraph 2 of draft principle 19 very carefully: the Hague Regulations were to be read together with the Fourth Geneva Convention and other rules of international law.

Draft principle 20, with its reference to "sustainable use", might go beyond the scope of the topic. Moreover, the lack of clarity on the notion of sustainable development might lead to opposite interpretations of the text. Mr. Murphy considered that the wording might preclude the use of natural resources by the occupying Power, which was allowed under usufruct, while Mr. Rajput regarded the concept of sustainable use as broader than usufruct, as set out in article 43 of the Hague Regulations. The reference to minimizing environmental harm seemed to be covered by the wording of draft principle 19. Draft principle 20 might therefore be superfluous, as any necessary elements could be covered in draft principles 19 and 21 and dealt with in the commentary.

Draft principle 21 covered the "no harm" principle, which had been extensively addressed by the Commission in the context of its 2001 articles on prevention of transboundary harm from hazardous activities. Although others had questioned the use of the phrase "all the means at its disposal", he had no objection to restating that principle, subject to careful consideration of the wording by the Drafting Committee.

He agreed that draft principles 19 to 21 should be referred to the Drafting Committee.

Mr. Šturma said that he was in general agreement with the approach taken by the Special Rapporteur in her first report and with most of the draft principles she had proposed. The report addressed protection of the environment from three perspectives: under the law

of occupation; through international human rights law; and through the continuing application of international environmental law.

Although the traditional law of occupation, as codified in the Hague Regulations, still broadly informed the rights and obligations of an occupying Power, it was not particularly helpful in terms of protection of the environment, which had not been considered a matter of international law at the time when the Regulations had been adopted. The same held true for other instruments of the law of armed conflict, including the Fourth Geneva Convention. The first explicit rules on protection of the environment had appeared in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). He therefore understood why the Special Rapporteur had referred to protection of property rights and usufruct but he agreed with Mr. Park that those concepts had only limited impact on the protection of the environment *per se*. He did not, however, question the relevance of protection of the environment in the context of military occupation: the old law of occupation must be interpreted in the light of more recent rules of international law, including humanitarian, human rights and environmental law, to the extent that they were applicable in situations of occupation. In that regard, the references made to advisory opinions of the International Court of Justice and to the Commission's 2011 draft articles on the effects of armed conflict on treaties were useful.

In addition to the Hague Regulations, which set out the general concept of occupation and some basic rules, particularly in article 43, common article 2 of the Geneva Conventions of 1949 should also be taken into account. The cumulative conditions defining a state of occupation, taken from the International Committee of the Red Cross commentary of 2016 on common article 2 and reproduced in paragraph 23 of the report, were broad enough to include various situations of occupation, both short-term and long-term. The key element was the physical presence of a State's armed forces in a foreign territory without the consent of the local government in place at the time of the invasion and the fact that the foreign forces were in a position to exercise authority over the territory concerned. However, introducing the concept of "pacific occupation", or occupation by agreement, was not helpful. Provided that such agreement was not imposed through the use or threat of force, rendering it void *ab initio*, the presence of foreign forces would be governed by that agreement rather than by the general international law of occupation. The consent of the territorial State and the treaty basis were what served to distinguish the legal regime of a foreign military presence and foreign bases from the general law of occupation. Another possible basis for the presence of foreign military forces was a binding resolution of the Security Council. For the purposes of the present topic, most situations were covered by draft principles 7 or 8, which had already been provisionally adopted by the Drafting Committee and noted by the Commission.

It remained conceivable, despite the approach to agreements on the status of forces or missions and to peacekeeping operations taken in draft principles 7 and 8, that an international organization might be involved in military occupation, depending on certain legal and factual conditions. Under their statutes, not all international organizations had competence in military matters. Even more important was the issue of whether an organization had the means to exercise control over an occupied territory. It would depend on effective control and command, which might remain with the international organization, as the European Court of Human Rights had concluded in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* in relation to Kosovo, or with a single State or a collation of States, as in *Al-Jeddah v. the United Kingdom* with respect to Iraq. Although all three cases had concerned the application of the European Convention on Human Rights, the distinction might be equally relevant to applying international environmental law in situations of occupation.

As the concept of occupation applied only to international armed conflicts, he agreed with the Special Rapporteur's choice to address protection of the environment in non-international armed conflicts separately in a future report; however, certain non-State actors might be involved indirectly in the issues dealt with in the draft principles proposed so far. The obligations of an occupying State should be limited to the territory under its effective control. If a resistance movement in the occupied territory caused, by its own actions,

environmental harm within that territory or to another State, the occupying State could hardly be responsible for such damage.

He agreed with the amended version of draft principle 19 (1) proposed by the Special Rapporteur in her introductory statement. Both Mr. Park and Mr. Murphy had made important points with respect to paragraph 2 of that draft article. Given the importance under the law of occupation of respecting the legislation of the occupied territory, the phrase "unless absolutely prevented" was insufficient: the potential exceptions to respecting that legislation should be developed in more detail. Moreover, such measures should not be arbitrary and must take into consideration the interests of the occupied population, which was also important in view of the emphasis placed in the report on the application of human rights law.

Draft principle 20 was more problematic. Although very concise, it attempted to capture at least two different concepts: the sustainable use of natural resources in an occupied territory and the minimization of environmental harm. Both could be deduced from modern international environmental law, but it was less clear whether they applied fully to the situation of occupation. The concept of sustainable development — usually understood as "meeting the needs of the present without compromising the ability of future generations to meet their own needs" — was a concept proposed in the 1980s to reconcile the tension between economic development and protection of the environment. It had no clear definition and was not a legal principle from which legal obligations of States could be derived. If the term was to be retained in draft principle 20, the text should be reworded. The fact that an occupying State had no sovereignty over the territory it occupied had a bearing on its right to administer and use natural resources in that territory: its rights and obligations as an administrator were much more limited than those of the territorial sovereign. The term should be qualified to the effect that the occupying State could administer and use certain natural resources but should do so in a sustainable manner.

The reference in draft principle 20 to minimizing environmental harm was fundamentally an expression of the "no harm" principle. Given the context, and the scope of application of draft principle 21, it would be better expressed as an obligation not to cause "significant" harm to the occupied territory itself as a result of activities carried out by the occupying State. Draft principle 21 reflected an obligation that was part of international environmental law and one with which he agreed in principle; nevertheless, it was something to be expected of occupying States in situations of prolonged occupation similar to the situation in peacetime, rather than during armed conflicts.

He recommended referring all the draft principles proposed to the Drafting Committee.

Mr. Peter, welcoming the smooth handover of the topic from Ms. Jacobsson, the former Special Rapporteur, to Ms. Lehto, said that he took exception to the manner in which the Commission was addressing the issue of occupation, which, for States that had once been occupied, was an extremely serious one. However the law was interpreted, it was questionable that an occupying Power had any legitimacy or right to exploit the natural wealth and resources of an occupied people. Most occupying Powers acted like common thieves. They stole the natural resources of the occupied people, whether those resources took the form of oil, gas, minerals or forest products. An occupation remained an occupation regardless of whether an adjective such as "pacific" or "belligerent" was used to qualify it.

Mr. Gómez-Robledo had listed a number of territories that were or had been occupied either by States or by organizations, including the Saharawi Arab Democratic Republic, South Ossetia, Kashmir, Nagorno-Karabakh, Tibet and Kosovo. He would add that the 2002 Constitutive Act of the African Union allowed it to intervene in a member State in certain situations. Thus, as other Commission members had argued, it was certainly possible for a territory to be occupied by an organization.

Experience showed that all occupations were combative in nature. It was not possible for a people to enjoy friendly relations with its oppressor. It was for that reason that many countries around the world commemorated the day on which they had gained

independence from their occupiers. It was important to approach the Special Rapporteur's report with that understanding of occupation in mind.

The Special Rapporteur had selected a number of important areas of international law to link with armed conflict and occupation. He would not attempt to examine the protection of the environment through the rules of the law of occupation, which were by and large never respected by the occupier. Occupying Powers never assumed their duty under article 43 of the Hague Regulations to restore and ensure public order. Occupiers had a different agenda, and there was little sense in engaging in theoretical speculation in that regard. It was owing to occupation that Iraq and Libya were currently in such a dire situation. Numerous other examples could be provided.

He fully endorsed the Special Rapporteur's decision to raise the issue of property rights in relation to environmental destruction and in particular the link that she drew between property rights and well-established principles such as that of sovereignty over natural resources.

The Special Rapporteur had made clear that the list of "properties" given in article 55 of the Hague Regulations, namely "public buildings, real estate, forests, and agricultural estates", was not exhaustive and applied to all immovable property not used for military operations. It was therefore not necessary to debate exactly what was included in that list. The important point was that the natural resources of a territory did not belong to the occupier.

In its judgment on the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had asserted that the principle of permanent sovereignty over natural resources was not applicable to "the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State". He wished to align himself with Judge Abdul Koroma, who, in a separate declaration on the case, had rightly noted that permanent sovereignty over natural resources remained in effect at all times, including during armed conflict and occupation. Thus, the fact of occupation in no way altered the status of the natural wealth and resources of an occupied people. The International Court of Justice had looked into the question of whether an occupying Power could exploit the natural resources of an occupied territory for the benefit of the local population, but one might wonder how, in such circumstances, it would be determined what proportion of the natural resources exploited by an occupying Power should remain in the occupied territory and what proportion should be sent back to the capital of the occupying State to cover the administrative costs of running the occupied territory.

The right to health was an important consideration, since environmental degradation usually had a serious impact on the health of an occupied population. That was a fact that required little legal justification. Nevertheless, as detailed in paragraph 64 of her report, the Special Rapporteur had identified solid case law from almost every region in the world to make that point. That case law underscored the connection between environmental degradation, on the one hand, and the human rights to life, family life, health and food, on the other. It was important to highlight the specific rights of the occupied population because its health and well-being were not among the occupier's priorities.

He had expected the Special Rapporteur to specifically address the right to food in the context of occupation. He noted that, in the select bibliography contained in her report, the Special Rapporteur had included several works relating to the right to food, including a seminal work edited by the late Katarina Tomasevski. He was not claiming that she had ignored the right to food, but he was requesting that it should be given the attention that it deserved. Food was often used as a weapon in situations of war or occupation, including against the occupied population. One danger was that access to food might be made conditional on the so-called pacification of the population. Situations of war also prevented the population from engaging in farming or other forms of food production, which increased its vulnerability. The Special Rapporteur noted that the fundamental purpose of article 54 (2) of Protocol I additional to the Geneva Conventions of 1949, which was quoted in footnote 170 of her report, was to protect the civilian population and to prevent policies that could starve out civilians or cause them to move way. He would therefore urge

the Special Rapporteur to consider addressing the right to food in the context of occupation. Lack of access to food forced people in times of war and occupation to engage in such activities as prostitution. In addition, food was sometimes made artificially scarce in times of war. In that connection, he would draw attention to the legal problem of the "grudge informer" case, which had given rise to an interesting debate between H.L.A. Hart and Lon L. Fuller on the relationship between a legal system and justice or morality.

The proposed draft principles were by and large rather abstract in nature. It might be necessary to introduce some amendments to them before they were referred to the Drafting Committee.

He supported the new formulation of draft principle 19 (1), as proposed by the Special Rapporteur. With regard to draft principle 19 (2), the words "unless absolutely prevented" should be deleted. He did not agree with the justification that the Special Rapporteur had provided for that draft principle in her opening statement. First, he was not sure that environmental rights were recognized in more than 100 constitutions. The constitutions of most countries focused on civil and political rights rather than on economic, social and cultural rights. However, article 24 of the African Charter on Human and Peoples' Rights did establish a people's right to a general satisfactory environment favourable to its development. Secondly, he was not sure that the constitution in force in a given territory would continue to apply in the event that it became occupied. With the exception of the right to life, the rights provided for in constitutions were often not protected under occupation. For those two reasons, he suggested that a more precise formulation was needed.

Draft principle 20 was also not satisfactory. It should be made clear that natural resources should be administered for the benefit of the local population. It could, for example, read: "An occupying State should administer natural resources in an occupied territory for the benefit and well-being of the local people in a way that ensured their sustainable use and minimized environmental harm." Although he would not insist on that exact formulation, it was important to capture that general idea.

Concerning draft principle 21, he would suggest deleting the word "significant", as its inclusion would give rise to unnecessary debate.

With regard to the future plan of work, the Special Rapporteur had omitted an issue identified by the Working Group on the topic, namely the responsibility of non-State actors. In the modern world, most wars were fought by proxy, by non-State actors on behalf of States. Military contractors and mercenaries played a role in all wars and would soon be involved in the occupation and administration of territories on behalf of their clients. That issue should be addressed in the draft. In that connection, he wished to draw the Special Rapporteur's attention to the written version of his statement, which offered examples of cases in which military contractors had been hired by States and provided references to relevant literature. He had no objection to any of the other issues that the Special Rapporteur had proposed for inclusion in the second report.

In conclusion, he recommended referring the proposed draft principles to the Drafting Committee in the hope that it would improve them.

Mr. Huang said that he would be grateful if Mr. Peter could clarify the meaning of his reference to Tibet in the context of a discussion of occupation. Tibet had been an inalienable part of China since the time of the Yuan dynasty beginning in the late thirteenth century.

Mr. Rajput said that he agreed with Sir Michael Wood's comments on the references by certain Commission members to specific territories in the course of the debate. With regard to the references to the occupation of Kashmir in particular, he could only assume that Commission members had been referring to the occupation of the territories in question by Pakistan.

Mr. Peter said that he had mentioned Tibet simply as one of the territories listed by Mr. Gómez-Robledo.

The Chair said that, regrettably, Mr. Gómez-Robledo was not present at the current meeting and could therefore not respond to Mr. Huang's comment.

Mr. Cissé said that he wished to congratulate Ms. Lehto on a well-documented and instructive first report. However, one highly important aspect that had not been addressed in the report was that of non-international armed conflicts, or internal armed conflicts. Such conflicts remained a major cause for concern in Africa, and led not only to human losses, but also to environmental degradation in the broadest sense of the term. That aspect would have to be addressed in the second report, but he nevertheless wished to underline the importance and urgency of legislating or at least adopting principles to govern the protection of the environment in relation to internal armed conflicts and to situations in which part of a country's territory was occupied by rebel military forces. In the light of the many conflicts that were taking place or had in recent decades taken place in Africa, it was necessary to clarify the responsibilities and obligations attributable to such forces in the event that they occupied a territory and thereby caused enormous damage to the environment.

He would take the example of his own country, Côte d'Ivoire, which, in 2002, had experienced an armed rebellion that had caused the northern and central parts of its territory to fall under the occupation of so-called rebel forces. The occupation had lasted nearly 10 years, and its environmental effects had been more than catastrophic. In such situations, it was unclear how the perpetration of environmental crimes by rebel forces that, in his view, had acted as an occupying Power should be dealt with under international law, even if the conflict remained an internal armed conflict. To his knowledge, the rules of international humanitarian law currently applicable to internal armed conflicts did not include specific provisions that clarified the responsibilities and obligations of the parties during and after an internal armed conflict. In Côte d'Ivoire and elsewhere in Africa, the massacres committed by rebel forces — which he would not hesitate to describe as environmental crimes — were, as far as he was aware, not currently subject to regional or international regulation.

Even more complex were situations in which an internal armed conflict acquired an international character through the presence of neutral and impartial forces whose main objective was to oversee a ceasefire and to bring and maintain peace. In general, such forces deployed considerable resources in terms of equipment and civilian and military personnel, which could cause severe environmental degradation. It was unclear, in such situations, how the responsibilities and obligations of the combatants and neutral parties would be determined; who should pay for the restoration of the damaged environment; and to what extent the operations of international neutral and impartial forces — such as the blue helmets and the French forces of Operation Licorne in the case of Côte d'Ivoire — contributed to the degradation of the environment. Those were some of the many questions that remained unanswered in the context of the international law on protection of the environment, and it would be possible to identify the applicable principles in the second report.

With regard to future research on the topic, it would in his view be appropriate to take into account the work of the United States Africa Command, which had for several years conducted capacity-building activities with a focus on protection of the environment in relation to armed conflicts, both international and non-international. The United States Africa Command initiative brought together the military, judicial, administrative and other authorities of various West African States in a spirit of cooperation with a view to raising awareness of the effects of armed conflicts on the environment and identifying measures that could be taken to reduce or eliminate them.

Turning to the proposed draft principles, he believed that draft principle 19 raised conceptual issues that made the text difficult to understand. The expression "territorial State" seemed too vague and even tautological in the sense that every State was already inherently territorial. In other words, it was not legally possible to conceive of a State without a territory, as the territory remained a constituent element of the State. However, the inclusion of "adjacent maritime areas" in draft principle 19 (1) seemed appropriate. While some Commission members, including Mr. Murase and Mr. Park, had suggested deleting the reference to maritime areas, he was in favour of maintaining it, as the territory of a State

included its land, maritime and aerial territory. The law of occupation did not alter that reality in the sense that it did not limit the exercise of the occupying State's powers in accordance with the nature of the territory concerned.

The reference to the "sovereign rights" that a territorial State was entitled to exercise over any adjacent maritime areas was problematic. Either a territorial State was coastal, in which case the concept of sovereign rights in draft principle 19 (1) would apply, or it was landlocked or without a coastline, in which case it would not, as a State without a coastline could not exercise such rights within the meaning of the United Nations Convention on the Law of the Sea. In addition, not all adjacent maritime areas were governed by the concept of sovereign rights. The Convention established different legal regimes according to the nature of the maritime areas under the jurisdiction of a coastal State, and those terminological distinctions should not be overlooked if the paragraph was redrafted to include maritime territoriality.

Draft principle 20 was focused on the protection of the environment in terms of sustainable use and the minimization of environmental harm. While he did not wish to downplay the importance of those two aspects, the obligations imposed on occupying States should not be limited to the administration of natural resources. In his view, the obligation to protect the environment should be supplemented with an obligation to protect the economic and social development of the occupied State and its population.

He recommended referring the proposed draft principles to the Drafting Committee.

Mr. Grossman Guiloff said that the proposed draft principles were of particular contemporary relevance given the numerous, often protracted, situations of occupation witnessed around the world. The critical importance of protecting and preserving the environment did not cease in times of armed conflict or during an occupation. He appreciated the Special Rapporteur's work to clarify principles from concurrently applicable branches of the law of armed conflict, human rights law, and environmental law. He particularly welcomed her comments on the relevance of draft principle 6, on protection of the environment of indigenous peoples, to the issue of occupation. As Mr. Gómez-Robledo had noted, the practice of the inter-American system regarding protection for indigenous peoples could be instructive in determining the obligations of the occupying State. In the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and *Sawhoyamaxa Indigenous Community v. Paraguay* cases, for example, the Inter-American Court of Human Rights had recognized a positive duty for States, pursuant to article 21 of the American Convention on Human Rights and principles of general international law, to respect and preserve the rights of indigenous peoples to property, culture and access to traditional sites. Thus, even beyond the legal obligation of the occupying State to restore public order in situations of occupation, as enshrined in article 43 of the Hague Regulations, there might also be a heightened duty in such situations with respect to the environmental impact on indigenous peoples. He hoped that that relationship would be fully addressed in the commentaries.

It seemed that Commission members generally agreed with the principle, articulated by the International Court of Justice, regional courts and treaty bodies, that protection under human rights law did not cease to exist in times of occupation. In such situations, human rights law was applied in conjunction with international humanitarian law. While there might be tension between those two branches of international law, that did not mean that the law of armed conflict overrode human rights law in all matters; rather, the notion of complementarity came into play, as noted by the Special Rapporteur in paragraph 57.

He agreed with the Special Rapporteur's treatment of the issue of derogation in times of occupation. Of course, under the Geneva Conventions of 1949, military necessity was the prevailing consideration. However, even under the law of armed conflict, military necessity was to be evaluated against the principles of proportionality, the distinction between civil and military targets and potential collateral damage. On the other hand, human rights law, which prevailed in peacetime, obliged States to align their actions with the interpretation of the law that was most beneficial for the protection of human rights. The concurrent application of those branches of law necessarily required a balance to be struck between issues of military necessity and human rights, including protection of

environmental rights. Article 15 of the European Convention on Human Rights, article 27 of the American Convention on Human Rights and article 4 of the International Covenant on Civil and Political Rights all provided that States could suspend certain rights, including those related to health and the environment, in times of emergency if there was a threat to the life of the nation, but only in limited ways and for the time strictly required by the exigencies of the situation. It was therefore difficult to maintain that an occupation automatically triggered derogation of human rights norms. Indeed, as had been noted, the International Court of Justice had addressed that specific issue in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, noting that certain human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, were applicable in the occupied Palestinian territory, and that the protection they afforded did not cease in cases of armed conflict, save through the effect of provisions for derogation of the kind found in article 4 of the International Covenant on Civil and Political Rights. Of course, it must be borne in mind that some rights were non-derogable and there were stringent tests for derogation from rights that were not absolute based on necessity, timeliness and proportionality.

In paragraph 51, the Special Rapporteur had drawn the appropriate conclusions from the Court's advisory opinion in that case. Those issues should be properly highlighted in draft principle 19 and he therefore agreed with the suggestion by Mr. Murase and Mr. Saboia to add a paragraph or reference in that draft principle explicitly noting the applicability of human rights law to situations of occupation. The Special Rapporteur should perhaps provide clarification of her assertion in paragraph 60 regarding the ability of an occupying Power to temporarily intern civilians under the law of armed conflict, but not under human rights law. It was important to note that the right to freedom of movement under human rights law, which was clearly affected by internment, was not a non-derogable right. Therefore, under human rights law and the law of armed conflict, States, including occupying Powers, could intern civilians provided the conditions for suspension of that right were met.

While the applicability of human rights law in situations of occupation seemed to be undisputed, given the jurisprudence of the International Court of Justice and others, the applicability of environmental law in such situations appeared to be in question. He did not share the concern raised by some members in that regard, and agreed with the Special Rapporteur's legal reasoning in chapter II of the report, which used the connection between human rights and environmental rights to recognize the applicability of environmental protection in situations of occupation. That connection was strong for at least three reasons. First, as the Special Rapporteur had noted, the Court's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* implied the complementarity of environmental law in times of armed conflict. Therefore, since situations of occupation might be considered international armed conflicts for the purposes of international humanitarian law, it followed that customary international environmental law would be concurrently applied along with international humanitarian law and human rights law in such situations. Further, the opinions of regional courts, some of which were mentioned in the report, also demonstrated the co-applicability of environmental law. One example was the recent advisory opinion of the Inter-American Court of Human Rights on the environment and human rights, in which it had recognized the right to a healthy environment as a human right and extended the definition of jurisdiction in article 1 of the American Convention on Human Rights to include extraterritorial actions causing environmental harm in another State. That logic would likely extend to actions taken by an occupying Power that violated international environmental law to the detriment of the occupied State or a third State.

Second, under article 43 of the Hague Regulations, which was accepted as customary international law, an occupying State had the obligation to take all the measures in its power "to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". Therefore, it followed that environmental regulations in place in the occupied territory should also be respected and enforced, unless doing so was absolutely prevented by military necessity. It would be helpful to clarify, perhaps with examples from practice, what was meant by the

words "unless absolutely prevented". Additionally, as recognized in paragraph 78, the Commission's 2011 draft articles on the effects of armed conflicts on treaties indicated that treaty obligations, including environmental obligations, did not necessarily cease to apply in times of armed conflict.

Third, although some members had criticized the Special Rapporteur's reliance on the right to health in demonstrating the connection between human rights law, environmental law and the law of armed conflict, he agreed with her approach, which stemmed from the close relationship between the right to health and the right to life, the latter being a non-derogable right. Regarding the link between the right to life and the environment, the Special Rapporteur referenced several important cases, including the judgments of the Court of Justice of the Economic Community of West African States in *SERAP v. Nigeria* and the Inter-American Court of Human Rights in *Yanomami v. Brazil*. Those cases, combined with the jurisprudence of the International Court of Justice holding that occupying States retained their human rights law obligations in any territory where they exercised *de facto* control, supported the Special Rapporteur's reliance on the right to health in demonstrating the importance that should be attached to environmental rights in situations of occupation. It might also be worth considering the connection between the right to life and other important rights, such as the right to food. The *Paquete Habana* case of 1900 was an interesting example in that regard; the United States Supreme Court had cited lengthy legal precedents to support the existence of a customary international law that exempted fishing vessels from prize capture. That case expressed the broader principle that, even in times of war, situations of environmental damage that could affect the general population could not be ignored under customary international law.

He agreed with the Special Rapporteur that it was wise to address situations of occupation as a separate issue in the draft principles. As pointed out by Mr. Park, one of the challenges of codifying rules related to situations of occupation was the issue of determining when a situation of occupation had ended, but in his view that unique characteristic only reinforced the argument for addressing the issue separately. Concurrent application of the draft principles related to occupation and the draft principles in parts two and three should be addressed in the commentary rather than in the proposed draft principles themselves. Regarding the distinction between belligerent and pacific occupation, he shared the view of those members who considered that the Commission should avoid further narrowing the definition of occupation. He also wondered whether such a distinction might not be inconsistent with the previously adopted draft principles, which covered the variable periods of before, during and after conflict.

Mr. Park's suggestion to include potential occupations by international organizations was an interesting one and, based on the examples presented thus far, there seemed to be a modicum of practice that demonstrated that his concern was not purely theoretical. For example, the cholera outbreak introduced by United Nations peacekeepers in Haiti had allegedly resulted in more than 10,000 deaths. While those situations did not constitute occupation, they did show the need for regulation. In view of such experiences, he did not believe it was outside the realm of possibility that an international organization could at some point exercise control in a situation of occupation. He did not share the concerns that had been expressed regarding the applicability of the Geneva Conventions of 1949 and the Hague Regulations of 1907 to international organizations. Many, if not all, of the provisions of those instruments embodied customary international law and applied to international organizations. That being said, given the complexity of the topic, the Commission should adopt a cautious approach and avoid generalizations when it came to the applicability of the law of occupation to international organizations. Perhaps the issue should be addressed in the commentaries.

Turning to the individual draft principles, he agreed with the substance of draft principle 19 but would support adding the paragraph suggested by Mr. Murase concerning the applicability of human rights law to situations of occupation and clarifying in the commentary the use of the phrase "unless absolutely prevented". As the Special Rapporteur noted in her report, environmental regulation was, at least to some degree, a responsibility assumed by almost all States. However, it was important for such regulation to leave room for future developments in science and technology. Moreover, such developments must

involve a valid process of consultation, which had consequences for the recognition of the right to self-determination. At least when it came to enduring situations of occupation, compliance with the obligation under article 43 of the Hague Regulations to take all possible measures "to restore, and ensure, as far as possible, public order and safety" would likely give the occupying State grounds for adopting measures that it could claim were designed to improve environmental protection in the occupied State over time.

That being said, he also understood Mr. Rajput's concerns that the Commission should not strive to legitimize situations of occupation by creating rules that would seemingly only apply in protracted situations of occupation or that would affect the economic or social fabric of the occupied State. It was, of course, necessary to strike a balance between the international obligations applicable to the occupying and the occupied States.

He also supported the substantive elements of draft principle 20 and agreed with the Special Rapporteur that it followed the rules of customary international law codified in articles 43 and 55 of the Hague Regulations. The references to sustainable development and the concept of usufruct in paragraphs 31 and 91 of the report were very useful. He welcomed her acknowledgement of the relationship between the use of natural resources and the right to self-determination of the occupied State and her references to Protocol I additional to the Geneva Conventions of 1949. Article 55 of the Protocol expressly obliged States to take care to protect the natural environment against widespread, long-term and severe damage, and included a "prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population".

He did not share the concerns raised by previous speakers about the relevance of environmental protection to the concept of sustainable development, which was one of the most ubiquitous topics in the field of international environmental law. Article 4 of the Rio Declaration on Environment and Development very clearly recognized an obligation for the international community of States to enhance protection of the environment and article 7 provided for the concept of common but differentiated responsibilities, which permeated the discussion on sustainable development and environmental responsibilities. Thus, in his view, the balance to be struck in efforts to achieve sustainable development was between the right of developing countries to develop their economies and the right of all States and future generations to a functioning environment. Various aspects of environmental protection were also clearly enshrined in the Sustainable Development Goals. He therefore did not believe it was accurate to say that the concept of sustainable development did not include heightened environmental protection. While he agreed with other speakers that sustainability was to a great extent a political rather than a legal principle, reference should be made to the fact that some States had acquired legal obligations related to sustainable development through their commitments to mitigate the effects of climate change and other environmental harm in certain environmental agreements.

He also agreed with draft principle 21, establishing the duty of occupying States not to cause significant damage to the environment of other States or to areas beyond their effective control. That concept was set out in principle 21 of the Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) and principle 2 of the Rio Declaration on Environment and Development. As correctly stated by the Special Rapporteur, that draft principle corresponded to the concept of due diligence, which had been directly applied to the occupation context in the advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

With regard to future work, he fully supported the Special Rapporteur's decision to consider issues relating specifically to non-international armed conflicts. Taking into account the nature of numerous modern conflicts and their clear impact on the environment and the life and well-being of people, work on the topic would not be complete without addressing non-international armed conflicts.

In conclusion, he supported sending all three draft principles to the Drafting Committee, where he hoped that his suggestions would be taken into account.

The meeting rose at 1.05 p.m.

Provisional

For participants only

14 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3430th meeting
Held at the Palais des Nations, Geneva, on Monday, 16 July 2018, at 10 a.m.

Contents

Protection of the environment in relation to armed conflicts (*continued*)

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.00 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

The Chair invited the Commission to resume its consideration of the first report on protection of the environment in relation to armed conflicts (A/CN.4/720).

Mr. Zagaynov said that the Special Rapporteur's first report, with its thorough analysis of different aspects of the challenging topic, provided a good basis for fruitful discussion in the Commission, which was of particular importance given the opinions that had been expressed on the issue in the Sixth Committee.

He agreed that the principle that the Commission could not modify the law of armed conflict should be adhered to consistently. In that connection, he was not convinced that it was possible, at the present stage, to establish norms for protection of the environment in relation to armed conflicts, as some speakers had suggested. That would be an attempt to change international humanitarian law in the area. The standards of international law applicable in situations of armed conflict should be completely clear, and priority should be put on ensuring the safety of the civilian population; while protection of the environment was important, it should not be placed on the same level. If, for instance, a pilot had to bring a plane down in either a densely populated district or a nature reserve, it was clear which he or she would choose.

It should not be forgotten that the general scope of the topic must be limited to the framework of armed conflict. He did not fully understand the logic behind some of the draft principles already adopted relating to the period before an armed conflict; if more detail were not added, they would actually be about protection of the environment during peacetime. The matter had certainly been discussed previously, but he nevertheless wished to express his doubts on the issue, particularly as the Special Rapporteur was suggesting that those provisions would apply to the section on occupation.

Some of the wording, such as "areas of major environmental and cultural importance" or "protected zones", was very general in nature; the designation of such areas outside of wartime should not be a subject of consideration. In the context of armed conflict, demilitarized zones, hospitals and security zones would be considered as protected zones under international humanitarian law, as would unprotected towns and populated areas. It should be remembered that, when the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) was being developed, the idea of extending that status to other areas or zones had not won the necessary support. If that were ignored, the Commission's work might not correspond fully to current international humanitarian law. He hoped that a general explanation of the relevant issues would be included in the commentary.

He agreed that it was not appropriate to provide a definition of occupation. As Mr. Murase and others had said, occupation could take different forms: short-term or decades long, accompanied by active military action or acts of terrorism, or peaceful and without bloodshed; there could be different practical consequences of occupation for the civilian population. Some of the situations that had been mentioned during the discussion were not situations of occupation and so did not belong to the topic under consideration. The Special Rapporteur had adopted the optimum approach, proposing general wording for principles that would be used for all the various types of occupation. Any more specific wording by type of occupation would not be feasible.

He supported the proposed structure of the analysis, including, as it did, sections on international humanitarian law, international human rights law and international

environmental law, on the understanding that those "peaceful" branches of international law were used to the extent that they did not contradict humanitarian law.

In respect of draft principle 19, he thought that the Drafting Committee should discuss the questions raised by Mr. Murase, Mr. Rajput, Mr. Hassouna, Sir Michael Wood, Mr. Cissé and others on the inclusion in paragraph 1 of a reference to maritime areas, and adjust the wording accordingly. He agreed with Mr. Murphy that paragraph 2, on respecting the legislation of the occupied State, should not be worded too strictly. It was unlikely that environmental protection had been an issue when the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) had been adopted.

On draft principle 20, although the current text did not reproduce wording that had been agreed in the past, it could form a good basis for discussion. While the text could certainly be improved on, he did not support Ms. Galvão Teles' suggestion of taking the exact wording used by the Institute of International Law, which mentioned the possibility of using natural resources of the occupied territory "to meet the essential needs of the population". If an occupation lasted for many years, he did not think it would be right to underline concern only about the population's basic needs, disregarding its other interests.

On draft principle 21, he agreed with the proposal made by Mr. Murphy and Mr. Rajput on the use of the wording "take all appropriate measures" or "exercise due diligence".

In respect of future work, he thought that it was logical to include an analysis of non-international armed conflict in the work on the current topic. It would also be interesting to include the actions of non-State armed groups. As Sir Michael Wood had noted, the Special Rapporteur and the Commission needed to return to using the terms "environment" and "natural environment" in the document. A brief analysis of that issue could be included in the next report. He was concerned that the questions about dispute resolution and compensation might "overload" the next report and the draft principles in general.

In conclusion, he thanked Ms. Lehto for the analysis and proposals and hoped that the topic would be concluded on its first reading in 2019. He supported the referral of the draft principles to the Drafting Committee.

Mr. Vázquez-Bermúdez said that he welcomed the Special Rapporteur's excellent first report, which would allow the Commission to make significant progress on the topic on the basis of its previous work under the guidance of her predecessor, Ms. Jacobsson. He agreed to a large extent with the analysis and proposals made by the Special Rapporteur.

As the Special Rapporteur recalled in her report, the Working Group that had been established the previous year to consider the way forward in relation to the topic had noted that substantial work had already been done on the topic and had underlined the need for its completion. The Working Group had further noted that, in addition to certain aspects of the draft principles, such as streamlining, terminology, filling gaps and overall structuring of the text, as well as completion of the draft commentaries, there were other areas that could be further addressed including, *inter alia*, issues of complementarity with other relevant branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors and overall application of the draft principles to armed conflicts of a non-international character.

As noted by the Special Rapporteur, many States, including Greece, El Salvador, the Federated States of Micronesia, Portugal, Thailand, Malaysia, Romania and Trinidad and Tobago, had expressed support for the idea of considering the interplay between the law of

armed conflict and other branches of international law, in particular human rights law and international environmental law.

The report focused on the protection provided to the environment by international humanitarian law — or the law of armed conflict — in respect of occupation, including the Hague Regulations of 1907, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I), and customary law. The report also addressed the complementarity of other relevant areas of international law in the context of occupation, such as international human rights law and international environmental law.

The three proposed draft principles on protection of the environment in situations of occupation were at a high level of abstraction and the accompanying commentaries would therefore be extremely important when adopted. The first report contained many useful points supporting and explaining the scope of the draft principles.

While situations of occupation were never desirable nor, still less, to be encouraged, the fact was that they occurred and often became prolonged, making it necessary for them to be regulated under international law. The norms of international law related to protection of the environment were thus of interest, both in terms of the occupied territory and of action taken in the occupied territory that could have an impact on the environment of other States or areas beyond national jurisdiction.

In respect of proposed draft principle 19, he supported the new wording put forward by the Special Rapporteur when presenting her report, which indicated that the occupying Power must take environmental consideration into account in the administration of the occupied territory, including in any adjacent maritime areas over which the territorial State was entitled to exercise sovereign rights. Without prejudice to any drafting changes that might be made, the specification contained in the second part of paragraph 1 was relevant in that, for the purposes of the environmental considerations to be taken into account in the administration of the occupied territory, it encompassed maritime areas, such as the exclusive economic zone and the continental platform, and, obviously, the living and non-living resources contained therein. In that regard, reference could be made to any maritime area over which the occupied territory was entitled to exercise jurisdiction.

He also agreed with paragraph 2, which was based mainly on the so-called conservationist principle, which set general limits on the competences of the occupying Power in the occupied territory.

Draft principle 19 (2) was appropriate in that it provided that the occupying State, unless absolutely prevented, should respect the environmental legislation of the occupied territory. The provision embodied the so-called conservationist principle, which set the general limits to the occupying State's competences in the occupied territory.

Proposed draft principle 19 was well substantiated in the Special Rapporteur's report, in particular by article 43 of the Hague Regulations, as interpreted in the current context, for instance, in terms of the essential interest of a State in protecting its environment, as recognized by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, an essential interest which must be respected by the occupying Power as a temporary administrator. The Special Rapporteur's analysis of the complementarity in that respect of international human rights law, particularly the right to health, the right to food and the right to life, and a healthy environment, was also relevant.

It had been broadly recognized in international and regional jurisprudence that international human rights law continued to be applicable during armed conflict, including

in situations of occupation. Furthermore, the occupying Power was also bound by its own human rights obligations in occupied territory, including those under customary international law.

On the basis of those considerations, there should be added to the draft principle a reference to the obligation of the occupying Power to respect its obligations under international law, in addition to its obligation to respect national legislation.

He concurred with the use of the term "legislation" in paragraph 2 in that it was a general term that covered constitutional, legal and other norms in force in an occupied territory. He agreed with those members who had said that the term "occupying Power" should be used instead of "occupying State". Furthermore, as some members had said, the possibility that an international organization might, in certain circumstances, constitute an occupying authority should not be ruled out. The matter could be dealt with in the commentaries.

Draft principle 20 was based on the right to property, and in particular on the so-called "usufructuary rule", which was set out in article 55 of the Hague Regulations, as well as on other relevant and complementary rules and principles that had emerged following the adoption of those regulations. They included the principle of permanent sovereignty over natural resources and that of self-determination in relation to the exploitation of natural resources in territories under occupation.

The usufructuary rule had to be understood in terms of the concept of sustainable development, which underpinned various principles of international environmental law, such as the principle of intergenerational equity. As one of the dimensions of sustainable development, the sustainable use of natural resources incorporated the idea of striking a balance between the rate of the use of such resources and the benefits they provided to the population, including to future generations.

International law placed a number of limitations on occupying Powers in their role as temporary administrators of the natural resources of an occupied territory. As summarized by the International Law Institute, "the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population". The general prohibition of the destruction or seizure of property in the occupied territory, unless rendered absolutely necessary by military operations, was also important in the administration of natural resources and the protection of the environment.

For those reasons, it seemed necessary to expand draft principle 20 so that it covered more comprehensively the limitations imposed on the occupying Power's administration of the natural resources of an occupied territory. While he was not opposed to improvements along those lines being proposed in the Drafting Committee, any such proposals should retain the existing wording "shall administer natural resources", since the obligation set forth in the text provided that those resources were to be administered in a predetermined fashion, namely, by ensuring their sustainable use.

Draft principle 21 embodied the "no harm" or due diligence principle of international law. In her report, the Special Rapporteur provided sound arguments for the application of that principle in situations of occupation, including by means of citations from the International Court of Justice's advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, which indicated that "physical control of a territory and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", and its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the Court had indicated that States had a general obligation to ensure that activities within their jurisdiction and control respected the

environment of other States and of areas beyond national control. That principle had also been reiterated more recently in the Court's judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, paragraph 101 of which the Special Rapporteur had used as the basis for the wording of draft principle 21, which he endorsed. The phrase "shall use all the means at its disposal" in the draft principle allowed for flexibility in terms of taking existing circumstances into account.

He considered it appropriate for the draft principle to maintain the threshold of "significant damage" that was defined in the Commission's articles and commentaries thereto on prevention of transboundary harm from hazardous activities. In paragraph (4) of the commentary to draft article 2 of that project, the Commission had noted that: "It is to be understood that 'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'."

The complementarity between the protection of human rights and the protection of the environment had also been recognized by the Inter-American Court of Human Rights. In its advisory opinion OC-23/17 concerning State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity of persons under the jurisdiction of the State, the Court had indicated that States had the obligation to prevent significant environmental harm both within and outside their territory. In order to meet that obligation, they had the obligation to regulate, supervise and monitor activities under their jurisdiction that could produce significant harm to the environment; carry out environmental impact studies where there was a risk of significant harm to the environment; establish a contingency plan providing for security measures and procedures to minimize the possibility of a major environmental accident; and mitigate any resulting significant damage to the environment. That advisory opinion might usefully be cited in the commentaries to the draft principles.

In conclusion, he supported the referral of the three draft principles to the Drafting Committee, taking into account the comments made in the plenary debate.

With regard to the future work on the topic, he endorsed the Special Rapporteur's proposals in paragraph 100 of her report. It would also be useful for the Special Rapporteur to analyse in her second report the complementarity of international environmental law and of international human rights law with international humanitarian law, also with respect to situations of armed conflict, in general, both international and non-international, and in the post-conflict phase, i.e. not only in relation to situations of occupation.

With a view to filling the gaps in the Commission's work on the topic, the Special Rapporteur should also consider in her second report the issue of the prohibition of the use of environmental modification techniques for military or any other hostile aims having widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State, and propose a draft principle along those lines. That prohibition was directly related to the protection of the environment in relation to armed conflicts and was embodied in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Convention on Environmental Modification). It was noteworthy that the previous Special Rapporteur had indicated in her second report (A/CN.4/685) that, among the most well-known provisions that were germane to the protection of the environment were those that were found in the Convention on Environmental Modification.

The Convention defined environmental modification techniques as any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the Earth — including its biota, lithosphere, hydrosphere and atmosphere — or that of outer space. As to the phenomena that could be caused by such techniques, the following explanation was provided in the understandings regarding the

interpretation of the Convention that were drafted at the time of its adoption: "It is the understanding of the Committee that the following examples are illustrative of phenomena that could be caused by the use of environmental modification techniques as defined in article II of the Convention: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere."

Through the Commission's work on another topic on its current agenda, namely that of the protection of the atmosphere, it had been made aware of recent technological advances in the area of geo-engineering that made it possible to bring about large-scale modifications of the atmosphere. With that in mind, the Commission had provisionally adopted draft guideline 7 (Intentional large-scale modification of the atmosphere), which read: "Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law."

In paragraph (2) of the commentary to draft guideline 7, the Commission had indicated that: "The term 'activities aimed at intentional large-scale modification of the atmosphere' is taken in part from the definition of 'environmental modification techniques' that appears in the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques." Given the potential for such advances to be used for hostile aims, it was important for one of the draft principles on the protection of the environment in relation to armed conflicts to reflect the prohibition of military or any other hostile use of environmental modification techniques.

Ms. Oral, congratulating the Special Rapporteur on her successful first report, said that the challenge faced by the Special Rapporteur and the Commission was having to operate within the limited area of existing treaty law which predated the modern development of international environmental law. The challenge became especially evident in the context of occupation, since the principal sources were the Hague Regulations of 1907, which had codified customary international law of the nineteenth century, slightly updated by the Fourth Geneva Convention, the main purpose of which had been to provide for more enhanced protection for the civilian population in the aftermath of the horrors of the Second World War, and, to some extent, Additional Protocol I. The world had changed immensely since the adoption of those instruments.

The Special Rapporteur had therefore faced some daunting challenges in devising principles to meet the needs of the twenty-first century. As highlighted in the first report, the law of occupation was a relatively undeveloped area that relied on indirect sources. A further challenge was that the Commission's work on the topic should not "modify the law of armed conflict". That left the Special Rapporteur little room for manoeuvre around the very complex and delicate topic of occupation. For that reason, the Special Rapporteur's legal skills in presenting an excellent analysis of the current state of the law of occupation and efforts to adopt those old rules to modern concepts of environmental protection, including use of the evolutive method of interpretation, were to be commended. If the Commission could not modify rules that had been adopted in a different century under very different living conditions, technological capacity and consumption patterns, it needed to be able to interpret those rules that allowed for such flexibility to meet current needs.

In that connection, the work of Michael Bothe, a very well-known expert on international humanitarian law, cited in the report, should be noted. He had identified, principally on the basis of article 43 of the Hague Regulations and the Fourth Geneva Convention, three principles of law of occupation, which included the duty of good governance of the occupying Power. Article 43 also imposed on the occupying Power the duty to restore and ensure public order and safety — or "civil life", as expressed in the French authentic text. She agreed with Bothe's explanation that the elements of the duty of

good governance meant that the occupying Power must conduct its administration of the occupied territory according to what was expected of the modern State. The Commission's ultimate aim was to provide principles that reflected rules of occupation for a modern, twenty-first century State in relation to protection of the environment.

The Special Rapporteur also explained in her report that, the general obligation of the occupying State, under article 43 of the Hague Regulations, was an obligation to ensure that the occupied population lived as normal a life as possible under the circumstances and that such a normal life had an obvious connection to the protection of the environment, which was widely recognized as one of the core functions of a modern State.

In that context, it was worth recalling that the International Court of Justice, as Mr. Hassouna had noted, had emphasized the importance of the protection of the environment, stating that the "environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn". Furthermore, the importance of the protection of the environment had been recognized by the Court in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* as an essential interest of the State, a point also noted by the Special Rapporteur. The Commission must therefore interpret the existing rules with that in mind.

As explained by the Special Rapporteur and highlighted by several colleagues, occupation could be peaceful and resemble a post-conflict period or it could be a situation of intense hostilities or resumption of armed conflict. The duration of occupation could be short or long. In other words, the situation of belligerent occupation was a variable situation.

On that point, several members of the Commission had underlined the importance of the matter of the duration of an occupation during armed conflict and its consequences for the obligation of the occupying Power in relation to protection of the environment. The longer the occupation, the more questions arose. Under article 43 of the Hague Regulations, during a short period of occupation, the occupying Power was obliged to restore and ensure public order and civil life, returning it to its pre-armed conflict state. That was reflected to some extent in draft principle 15 on the post-conflict situation and its reference to remedial measures. However, it might be asked whether, in the case of long-lasting situations of occupation, the occupying Power was obliged simply to maintain the *status quo ante* or to do more.

In paragraph 103 of her report, the Special Rapporteur, aware of the variability of the character of belligerent occupation, raised the question as to the relevance of the existing draft principles to situations of occupation and suggested that the relationship of certain already provisionally adopted draft principles with the law of occupation should be clarified, presumably in the commentaries. She herself would go further and supported Mr. Park's proposal to have a provision stating that the draft principles in Part Two and Part Three would apply *mutatis mutandis* in the situation of occupation.

A further question, raised by Mr. Petrič in relation to human rights law, was whether the occupying Power was obliged to apply its own environmental protection standards to the occupied territory if those standards were higher than the laws in force in the occupied State. It might be, for instance, that the occupied State had laws that resulted in harmful fisheries practices or was not party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. If the occupying Power had stricter regulations, it would be unfortunate if, in line with the rule laid out in article 43 of the Hague Regulations, the laws of the occupied State were simply respected; that point should be kept in mind when considering draft principle 19 (2).

The Special Rapporteur had addressed the protection of the environment under the law of occupation examining the applicability of property laws, international human rights

law and international environmental law. In respect of property law, article 55 of the Hague Regulations laid down the usufructuary rule, whereby the occupying Power was the usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. Accordingly, the occupying Power must safeguard the capital of those properties and administer them in accordance with the rules of usufruct. The question was how the obligation to safeguard the capital of those cited properties translated into modern concepts of international environmental law based on broader notions of natural resources that included biological diversity, ecosystems and habitats. Article 55 listed specific natural resources not as natural resources *per se* but as exploitable natural resources with economic use and value. Could the rule of usufruct actually be made consonant with the modern and current concept of conservation and preservation? She believed that the Commission, through its work on the topic, could make an important contribution by providing a contemporary and modern understanding of article 55.

In paragraphs 90 to 92 of her report, the Special Rapporteur skilfully linked the concept of usufruct under article 55 to the more modern concept of sustainable use; that interpretation could be broadened to include a more general obligation of conservation of natural resources. The concept of preserving the capital and allowing the occupying Power to use only the fruit contained some elements of the modern notion of conservation but it was limited. It could be applied to renewable resources that were exploited, such as forests and fisheries, but it did not apply to protection of ecosystems, habitats and biological diversity outside the context of economic use. The issue was considered to some extent in paragraph 32 of the report and should be further addressed in the commentaries.

She agreed with other members of the Commission regarding the importance of continued application of the principle of permanent sovereignty over natural resources and self-determination in situations of occupation.

The issue of human rights and the protection of the environment was a very important and dynamic area of the intersection of laws. A synergistic relationship between human rights and environmental protection was developing. Many colleagues had gone into detail on the relationship between human rights and the environment, notably citing from the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the more recent *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case supporting the continued application of human rights in times of armed conflict and certainly in situations of occupation.

She agreed with the idea, as articulated in many of the statements made, that human rights law provided fertile grounds for extension of its rights to the environment, including the right to food. The relationship between human rights law and the environment was developing into a robust body of laws. As Mr. Grossman Guiloff had said, a recent advisory opinion of the Inter-American Court of Human Rights had recognized the fundamental right to a healthy environment under the American Convention on Human Rights and also the extraterritoriality of application of environmental obligations. She agreed that it was an area that could perhaps be reflected in a separate draft principle expressly focused on human rights and protection of the environment in situations of occupation, especially for prolonged periods of occupation.

The Special Rapporteur had examined the international law of protection of the environment in the situation of occupation. While the Hague Regulations and the Geneva Conventions did not contain express provisions on the obligation of the occupying Power to protect the environment, the principles of the 1992 Rio Declaration on Environment and Development did expressly address the matter. Principle 23 stated clearly that "the environment and natural resources of people under oppression, domination and occupation

shall be protected". She also appreciated Mr. Hassouna's reference to the Global Pact for the Environment.

On the proposed draft principles, she agreed with Mr. Petrič's suggestion regarding an introductory provision that, in all cases of occupation, the existing rules of international law for the protection of the environment should be respected.

Regarding draft principle 19 (1), she agreed with Mr. Hassouna that the language should include a reference to environmental principles and be more closely aligned with the *Iron Rhine ("Ijzeren Rijn") Railway* case, in which the arbitral tribunal had referred specifically to "environmental protection".

Proposed draft principle 19 (2) reflected the traditional approach of article 43 of the Hague Regulations. That "conservationist" approach had been challenged in doctrine and in practice after the occupation of Iraq and the adoption of Security Council resolution 1483 (2003). In her view, the Commission must take into account situations where the laws in force at the time of occupation did not necessarily reflect what was expected of a modern State or good governance, including protection of the environment. She therefore favoured maintaining the term "legislation", which the Special Rapporteur had clearly explained, and supported Mr. Hassouna's proposals to include references to customary international law, local custom and international environmental obligations, the latter also mentioned by Mr. Nolte. If the work of the Commission was to make any contribution to the subject, it must promote a modern set of principles.

Proposed draft principle 20, which was broadly based on the usufructuary rule of article 55 of the Hague Regulations and the notion of good housekeeping, as explained by the Special Rapporteur, or good governance, as described by Professor Bothe, had led to some interesting discussion as to the use of the term "sustainable use", which might lead to allowing the occupying Power to exploit the natural resources of the occupied State to a greater extent than contemplated in the usufructuary rule. The question of sustainable development was not really an issue where an occupation was of short duration; however, if the occupation lasted for an extended period, the rules of international humanitarian law should not create a situation that resulted in stunting the economic development of the occupied State, as might happen with a strict application of the usufruct rule.

Sustainable development and sustainable use were concepts found in many international instruments. Principle 4 of the Rio Declaration on Environment and Development stated that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". The International Court of Justice, in *Gabčíkovo-Nagymaros*, had explained sustainable development as the need to reconcile economic development with protection of the environment and stated, more significantly, that new norms had to be taken into consideration in treaty interpretation.

She considered that the 2015 adoption by consensus by the General Assembly of Transforming our world: the 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals had to some degree rendered moot the debate as to whether it was a legal principle or a policy, since sustainable development had been accepted at the highest level of State participation. It would therefore be rather incongruous if the Commission were to appear to be challenging the notion of sustainable development. Furthermore, in the *Iron Rhine* case, the arbitral tribunal had stated that "environmental law and the law of development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm". The tribunal had gone further to state that such a duty, in its opinion, was a general principle of general international law.

The Convention on Biological Diversity provided a definition of "sustainable use", albeit in relation to the components of biological diversity, as their use "in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations". She suggested that the definition should be included in the commentaries and guidance provided.

She further suggested that the term "minimizes", as used in draft principle 20 in the phrase "minimizes environmental harm", should be replaced with "prevents", to reflect the more commonly used terminology of "prevention".

Proposed draft principle 21, which expressed the widely accepted rule of customary international law on prevention and due diligence, should reflect the most recent pronouncements of the International Court of Justice, the International Tribunal for the Law of the Sea and arbitral tribunals. The draft principle should be aligned with those decisions and not the broader language of the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. She also thought there was merit to the suggestion to refer to the due diligence obligations, which could be taken up in the Drafting Committee.

On future work, she agreed on the need to examine the even more challenging questions related to non-international armed conflict and protection of the environment, for which Mr. Cissé had provided a compelling argument, and issues concerning responsibility and liability.

She was pleased to recommend that all three draft principles should be referred to the Drafting Committee.

Ms. Escobar Hernández said that she wished to congratulate the Special Rapporteur on her excellent first report, in which she had set out a detailed and systematic analysis of the topic in relation to situations of occupation. She had based her analysis on a review of the main applicable rules of international law and relevant judicial decisions, as well as on an extensive collection of bibliographical sources. Regrettably, the bibliography annexed to the report focused primarily on publications in English. In future, it would be desirable for such bibliographies, which were very useful to Commission members and scholars alike, to include some of the many, high-quality works that were available in Spanish.

Before turning to her observations on the report, she recalled the need to decide on the title of Part Four of the draft principles and on the titles of the draft principles it contained, and expressed her support for giving preference to the term "occupying Power" over that of "occupying State" for the sake of consistency with the terminology used in international humanitarian law.

She fully endorsed the Special Rapporteur's approach, in which occupation was essentially understood as a situation that arose in the context of and in relation to an international armed conflict and was evidenced by the effective control of all or part of the territory of a State by an enemy Power, and in which the occupying Power provisionally administered the territory, subject at all times to the rules of the law of armed conflict, in particular those specifically applicable to situations of occupation.

That approach was the only one that was relevant for the purposes of the present topic. All other concepts of occupation should, in her view, remain outside the scope of the draft principles, except where they had a connection with international armed conflict. That restricted approach did not in any way detract from the legitimacy of criticisms made of those other forms of occupation — especially colonial occupation — in a general sense.

However, combining them with the issue of military occupation in relation to international armed conflicts was technically untenable from the legal standpoint.

That said, the concept of occupation, as formulated in relation to the current topic, had somewhat evolved in practice, as pointed out by the Special Rapporteur in her report. That evolution must be taken into account when identifying the principles applicable to the protection of the environment in situations of occupation. Those principles could be subject to adjustment in terms of their application, especially in the case of long-term occupations. Despite the many existing types of occupation, it was not necessary to include a definition of each, as had been suggested by some Commission members, or to differentiate between the principles that would be applicable in each case. On the contrary, the very nature of the Commission's current exercise, namely that of identifying principles, required their broad definition. In her view, more detailed explanations of the concept of occupation, the various types of occupation that existed in practice and the possible adaptation of the draft principles to each would best be situated in the commentaries.

During the debate, some Commission members had raised the issue of the international administration of territory by an international organization — citing Kosovo as an example — or under the authority of an international organization — citing Iraq as an example. Although she did not believe that those two situations were equivalent in terms of being considered an "occupation", as understood in the draft principles, it was nevertheless true that the latter of the two could be seen as somewhat similar to an occupation under the law of armed conflict, and the former had at least one feature in common with a situation of occupation, namely, the fact that the mission established by the international organization *de facto* and provisionally administered the occupied territory, exercised the functions typical of a sovereign State and was backed up by military forces. Nevertheless, she had serious doubts as to whether that type of international administration could, strictly speaking, be considered as a situation of occupation, within the meaning ascribed to that concept under the law of armed conflict.

At the same time, she also disagreed with the conclusion reached by one Commission member to the effect that those situations were covered by draft principles 7 and 8 and should therefore not be taken into account in Part Four of the draft principles. On the contrary, draft principles 7 and 8 referred to very specific situations and did not cover all of the activities carried out by missions engaged in the administration of a territory by an international organization. For that reason, it would be useful to include a specific reference to those two situations, or at least to that of a territory placed under the administration of an international organization. That could be accomplished by the insertion of a final draft principle indicating that the principles on the protection of the environment in situations of occupation were applicable, *mutatis mutandis*, to situations concerning the international administration of a territory by an international organization.

That proposal was justified by the fact that such international administration had in any event been defined in practice in relation to armed conflict and that, furthermore, it was impossible to state unequivocally that the rules governing the law of armed conflict and international humanitarian law were not applicable to the integrated forces used in those operations. Developments occurring within the United Nations, especially those related to the Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law (ST/SGV/1999/13), prevented the maintenance of such a radical assertion.

The Special Rapporteur's approach to the topic, which consisted of analysing the interrelationship between the law of armed conflict, international humanitarian law, international human rights law and international environmental law, was correct and fitted perfectly within the framework of the topic under consideration. She fully endorsed the Special Rapporteur's analysis of international human rights law, its relationship to

international humanitarian law and its application in situations of occupation. Her analysis of the extraterritorial effects of the rules of human rights law that must be respected by the occupying Power in an occupied territory was of particular interest. However, it seemed excessively restrictive to focus the study of the applicable human rights law provisions on the right to health. It was, furthermore, not entirely compatible with assertions made in the report itself concerning other rights that might also be relevant in identifying principles for the protection of the environment in situations of occupation, such as the right to life or the right to food, not to mention the right to water, which was the subject of much attention in the United Nations. Moreover, that important analysis of the question of human rights was not expressly recognized in the draft principles, unlike the other areas of international law that the Special Rapporteur analysed in her report.

Turning to the draft principles, she said that she endorsed the general premise underlying draft principle 19, namely that the occupying Power must respect the environment of the occupied territory and take environmental considerations into account in the administration of the territory. In her view, the Special Rapporteur's arguments in support of the premise, which were contained in paragraph 50 of her report, were sound and convincing.

With regard to paragraph 1, she supported the inclusion of the reference to "adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights", since actions associated with the occupying Power's administration of the territory might also take place in those areas or affect the marine environment. However, it would perhaps be preferable to refer in paragraph 1 to maritime areas over which the territorial State "exercises sovereignty or jurisdiction" rather than "is entitled to exercise sovereign rights". Similarly, a reference should be included to the superjacent airspace of the occupied territory, for the same reasons as those applicable to maritime areas. The fact that the Hague Regulations referred to war on land did not appear to be sufficient justification for not including a reference to adjacent maritime areas or to the superjacent airspace in draft principle 19, since, for the purposes of environmental protection, they should be considered as combining with the land surface to form an integral whole.

Unlike some Commission members, she was not opposed to the inclusion in paragraph 2 of the expression "unless absolutely prevented", given the considerations set forth in paragraphs 48 and 49 of the report, but she did find it necessary to include in the commentary a detailed explanation of what was meant by that expression, so as to avoid erroneous or self-interested interpretations according to which the occupying Power could claim the right to modify the legislation of the territorial State. It would also be useful for paragraph 2 to contain a reference to the obligation to respect the rules of international environmental law.

The inclusion of a reference to the relationship between human rights and the protection of the environment was perhaps best placed in draft principle 19. That could be accomplished through the insertion of a new paragraph 3, which would read: "In exercising its competence to administer the territory, the occupying Power shall give special consideration to the need to protect the rights of the civilian population to life, health, food and water, as elements intrinsically related to the protection of the environment." [*En el ejercicio de sus competencias de administración del territorio, la potencia ocupante tomará especialmente en cuenta la necesidad de preservar el derecho de la población civil a la vida, a la salud, a la alimentación y al agua como elementos intrínsecamente relacionados con la protección del medio ambiente.*] That formulation could also be set out in a separate draft principle that would be placed immediately after draft principle 19.

She also supported the general premise underlying draft principle 20. While it was true that the concept of the protection of property in the context of armed conflict did not correlate exactly with that of the protection of natural resources in that context, it was also

true that its evolutive interpretation could be helpful for the purposes of protecting the environment, at least with regard to natural resources. The same applied to the use of the expression "sustainable use" as an evolutive interpretation of the concept of usufruct, which appeared in the Hague Regulations, and especially taking into account the fact that, although usufruct was an autonomous concept, its purpose was essentially to protect an asset that could be used by one subject but must ultimately be transferred to other subjects. For those reasons, she had no serious objections to the use of either "natural resources" or "sustainable use" in draft principle 20.

It was, however, necessary to indicate clearly that the administration by the occupying Power of the occupied territory's natural resources must be conducted on a limited and exceptional basis; that it must be compatible with the occupied territory's permanent sovereignty over the natural resources; and that it must at all times be exercised for the benefit of the civilian population, while safeguarding the interests of future generations. Although it was possible to include those elements in the commentary to draft principle 20, in her view, it was necessary, at a minimum, to explicitly refer to the civilian population as the direct beneficiary of the actions of the occupying Power in administering the natural resources of the occupied territory and to do so in the text of the draft principle.

She agreed with the content of draft principle 21; as the Special Rapporteur had noted, it was clear that the principle of due diligence should be applied.

With regard to the draft principles already adopted by the Commission, she shared the approach taken by the Special Rapporteur in paragraphs 101 to 104 of the report, as amended during the Special Rapporteur's statement, with respect to the relevance of those principles to situations of occupation. The considerations set forth in those paragraphs were of particular interest given the many different forms situations of occupation might take in practice, and they merited special treatment.

In that regard, the Special Rapporteur appeared to suggest that the interrelationship between principles that were relevant to situations of occupation could be resolved through the introduction of changes to the commentaries to draft principles 15, 16, 17 and 18. While that could be a simple and easily implemented solution, it was unclear whether that course of action would be sufficient to embrace the full scope of the problem as described by the Special Rapporteur in those paragraphs. On the contrary, the interrelationship between principles went beyond what was mentioned in paragraph 104; as such, it would be useful to consider other methods that could be used to complement the Special Rapporteur's suggestion. For example, a without prejudice clause could be included in the draft principles relating to situations of occupation, or a general commentary could be drafted in connection with Part Four, which would enable the inclusion of varying perspectives on how the draft principles contained in the other parts of the text applied to situations of occupation.

With regard to the Commission's future work on the topic, she welcomed the Special Rapporteur's proposal to address the protection of the environment in relation to non-international armed conflicts in her second report. There were many serious contemporary examples of that type of conflict and the issue could not be ignored in the draft principles that would eventually be adopted by the Commission.

She also agreed with the proposal to present the complete set of draft principles together with the preamble, with a view to adopting them on first reading in 2019.

Mr. Huang said that he wished to thank the Special Rapporteur for her report, on which he intended first to make some general observations. He had two technical suggestions: firstly, that the Special Rapporteur should adopt the approach of her predecessor, who had included a proposed draft principle immediately following the analysis of it, in order to help the reader understand the analytical process, and then provide

all the proposed draft principles together at the end of the analytical part of the report. Secondly, it would be helpful to suggest titles for the three draft principles she had proposed and any others that were proposed in her next report, in order to maintain consistency with the 18 draft principles that had been provisionally adopted by the Commission or the Drafting Committee.

Given the report's focus on environmental protection in situations of occupation, the concept of occupation and the relevant practices under occupation were particularly significant. The Special Rapporteur had explained the concept of occupation on the basis of the traditional definition in article 42 of the Hague Regulations, citing the explanatory definition in the International Committee of the Red Cross Commentary of 2016 on common article 2 of the Geneva Conventions for the protection of war victims, which appeared to be unproblematic in terms of concepts and, by and large, not too controversial in international jurisprudence. However, the limited number of cases to which the law of occupation was actually applicable had not been fully taken advantage of in the report's argumentation on the issue of occupation and environmental protection. Although the Special Rapporteur recognized that few cases had met the criteria of the Hague Regulations since the founding of the United Nations in 1945, the discussion on specific State practice appeared to avoid intentionally or unintentionally the classic cases of occupation, namely the Occupied Palestinian Territory, the Occupied Syrian Golan Heights and the Occupied Iraqi Territory. The State practice concerning occupations quoted in various parts of the report were mainly not classic cases of occupation. For instance, the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* had repeatedly been cited while the case of the occupation of the Palestinian territory, which had lasted more than five decades, had been cited only indirectly in reference to the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and the practices of the occupying authorities had rarely been touched upon. The same applied to the occupation by the United States of America and its allies in Iraq and Afghanistan and the practices of the United Nations Interim Administration Mission in Kosovo and the Kosovo Force. The result was that, apart from the advisory opinion of the International Court of Justice and the limited number of cases of regional courts of justice, examples of State practice related to occupation seemed to be few and far between in the report.

The second area that required improvement was the lack of differentiation between occupation of different natures, namely between legal and illegal occupation. In the first chapter of the report, entitled "Protection of the environment under the law of occupation", the Special Rapporteur focused on the fact of occupation or being under occupation while the issue of the legitimacy of the occupation had been neglected. All occupations were treated as the same in the discussion, which was, in his view, not appropriate. In the light of the basic principles of the Charter of the United Nations and contemporary international law, no State that occupied the territory of other States by illegal means should be accorded any of the rights, including the right to the exploitation of natural resources, that were enjoyed under legal occupations. As the age-old legal maxim went, *ex dolo malo non oritur actio*. In terms of illegal occupation, the primary requirement of international law was that the occupying Power must end as soon as possible its illegal occupation instead of taking advantage of the natural resources on the occupied territory. As the International Court of Justice had clearly indicated in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, "the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law … All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction." The Court further indicated that States should also refrain

from impeding the exercise by the Palestinian people of its right to self-determination. His proposal was to treat differently the two legal statuses of legal and illegal occupation, which were different in nature. The current draft might easily be misread as stating that the occupying Power, in a situation of illegal occupation, was entitled to the rights deriving from legal occupation. The relevant wording should be revised to include at least the words "without prejudice to".

Moreover, the focus on the protection of the environment under occupation in draft principles 19, 20 and 21 seemed to be somewhat misplaced. In his opinion, once the occupation entered its relatively peaceful third stage after the armed conflict, the urgent task for the protection of the environment under occupation was not to respect the existing legislation of the occupied territory relating to environmental protection or exploitation of natural resources, but to act as quickly as possible to eliminate and repair the environmental and ecological damage caused by the war, to eliminate the immediate threat to the environment by the remnants of war, including the removal of the mines laid during the war or unexploded explosives, bullets or other explosive devices, the aftermath of the illegal use of chemical, biological or other toxic weapons and the dismantlement and repair of infrastructure facilities such as reservoirs destroyed or heavily damaged in the war. Those were the primary tasks for the protection of the environment on the occupied territory after the war. The shift of the focus from that most urgent task to the exploitation of natural resources was not in line with the main objective of protection of the environment in armed conflicts and was therefore misplaced. Draft principle 16, on remnants of war, did however make provision for parties to the conflict, after conflict had ended, to seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that were causing or risked causing damage to the environment. Once occupation had begun, the obligations for the parties to the conflict under that article should be transferred in total to the occupying authorities.

His final general comment was that it seemed necessary to include international organizations in the discussion, as a number of members had mentioned previously.

Turning to specific comments on draft principle 19, he said that, insofar as paragraph 1 was concerned, the Special Rapporteur had discussed many aspects that were related to the administration of the occupied territory by the occupying Power, such as property rights, the use of natural resources and the right to health as part of human rights. However, a closer reading would show that those aspects had very little or weak relevance to the protection of the environment. The examples of international treaties, international jurisprudence or national practice cited in the report were focused on other issues.

An example was the law of occupation. Article 55 of the Hague Regulations, which was referred to and cited many times in the report, did not contain a direct provision on protection of the environment. Only through interpretation could a feeble link be established between that article and protection of the environment. Again, the report, when referring to the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), argued that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" constituted a grave violation of the Convention. As a matter of fact, article 55 of the Hague Regulations did not emphasize protection of the environment, but rather focused on the protection of public or private properties in occupied territory, hence it was very difficult to establish a direct logic between "occupation" and "protection of the environment".

The same was true in the area of human rights law. A considerable part of the Special Rapporteur's report was devoted to the right to health. While there were certain interlinkages between the right to health and the environment, it was unclear whether such a right could be protected only or, for that matter, mainly through protection of the environment. If the answer was no, then it would be difficult to establish a solid

relationship between the two. Moreover, protection of the environment might be in conflict with protecting other basic rights of citizens. Of course, the ultimate question remained, namely the linkage between those issues and the situation of occupation.

He therefore agreed with Mr. Park that there might be some skips of logic in the argumentation. While he was not opposed to the conclusion that the occupying Power should take into consideration the element of the environment, the automatic linkage between "occupation" and "protection of environment" remained an unresolved question.

With regard to draft principle 19 (2), he first wished to point out that there might be an error of referencing. In paragraph 44 of her report, the Special Rapporteur cited the opinion of Pictet, who had qualified the occupying State's powers as "very extensive and complex". In fact, that opinion originated from the International Committee of the Red Cross commentary on article 64 of the Fourth Geneva Convention, and not article 47, as referred to in footnote 179 of the report.

Regarding the draft principle itself, the phrase "unless absolutely prevented" constituted the only exception to the occupying Power's obligation to respect the legislation of the occupied territory pertaining to the protection of the environment. The wording in that part was identical to that of the Hague Regulations, except that "the laws in force in the country" had been replaced with "legislation of the occupied territory pertaining to the protection of the environment". As "the laws in force in the country" normally included environmental legislation, he did not therefore object to the Special Rapporteur applying *mutatis mutandis* the relevant provisions of the Hague Regulations to the question of environmental protection. However, the "forward-looking action" mentioned in paragraph 45 of the report created the possibility of breaking the content of draft principle 19 (2) on some grounds and ran the risk of being abused. It should therefore be treated with caution.

Draft principle 20 was primarily on sustainable use of natural resources. The sustainable use of natural resources had recently been of concern to Governments as well as being a hot topic of discussion in the international law community. As the Special Rapporteur stated in her report, a lot of State practice existed in that regard. However, what needed to be examined further was whether those practices possessed the necessary *opinio juris* required by customary international law, or whether they were solely based on policy or economic considerations of a State.

Of the cases mentioned by the Special Rapporteur, none seemed to demonstrate the existence of any treaty, customary international law or general rule of law which contained the notion of "sustainable use of natural resources". The Special Rapporteur, while citing the relevant decisions of the International Court of Justice, at the same time admitted that the Court had not recognized sustainable development as a principle of international environmental law. In the same vein, he had not found any relevant State practice in the report. It appeared that States neither recognized "sustainable use of natural resources" as a binding rule of international law nor did they practise it in reality.

Specifically in situations of occupation, and in relation to the understanding of article 55 of the Hague Regulations, the Special Rapporteur suggested that the notion of "safeguard[ing] the capital of [those] properties" would have to be equated with "sustainable use of natural resources". Such an equation was on rather shaky ground, to say the least.

In view of the foregoing, caution should be exercised when deciding whether and how to put the notion of "sustainable use of natural resources" into the draft principles. As pointed out by the Special Rapporteur in paragraph 97 of her report in relation to sustainable development, "questions nevertheless remain as to its precise content and scope". Moreover, some members had spoken about the necessity for that obligation to be applied only to stable situations of occupation. Some other members had referred to the

question of permanent sovereignty of the State whose territory was occupied over its natural resources. Those views were worth further consideration.

Draft principle 21 dealt primarily with the question of avoiding significant damage to another State or to areas beyond national jurisdiction. The Commission had already deliberated on the topic of transboundary damage, and had adopted the articles on prevention of transboundary harm from hazardous activities, draft articles 1 to 3 of which basically covered the content of draft principle 21, to which he had no objection in principle. However, he wished to seek clarification from the Special Rapporteur on one point, namely the phrase "areas beyond national jurisdiction". It was unclear whether the scope of that phrase covered the high seas, polar areas and outer space. It was his belief that the question needed to be treated cautiously. There should be a proper limitation to the extension and scope of the notion of "areas beyond national jurisdiction".

As for the future work outlined in the report, the Special Rapporteur proposed to address the question of non-international armed conflicts in her next report. He was unsure whether it was necessary to extend the scope of the present topic to non-international armed conflicts, as they were entirely different from international armed conflicts in nature. There were huge differences in the applicable laws and very little State practice in that regard. He hoped that the Special Rapporteur would give that question her careful consideration.

In conclusion, he agreed to sending draft principles 19, 20 and 21 to the Drafting Committee.

Mr. Ruda Santolaria said that he welcomed the Special Rapporteur's excellent first report on protection of the environment, which tied in well with the work that had been done by the previous Special Rapporteur for the topic. The report, which was well documented, contained a broad bibliography and illuminating supporting evidence.

In that respect, the Special Rapporteur's research underscored the fact that occupation encompassed a range of situations reflecting the interrelationship between the law of armed conflict, international human rights law and international environmental law. It also highlighted the absence of established rules regarding the duration of occupation, which in some cases could last many years, even though it had been understood as an intermediate stage between the cessation of hostilities and peace which should not last very long, but in which the fundamental element was, as set forth in article 42 of the Hague Regulations of 1907, the *de facto* control exercised by the armed forces of a State over part or all of the territory of another State, which included adjacent maritime areas and superjacent airspace. In that scenario, authority was rooted not in transferral of sovereignty, which had not occurred, but in effective *de facto* control. "Indirect occupation" was also possible, insofar as a foreign Power operated through local *de facto* agents or bodies. The definition was based on the concept of belligerent occupation, although it now included other cases in which the forces of one or several States temporarily exercised their authority over a territory located outside the internationally recognized borders of that State.

He agreed with the Special Rapporteur that the application of human rights law to situations of occupation depended on the prevailing circumstances, such as the nature of the occupation — calm or volatile — and its duration; at the same time, it was, in many ways, conditioned by the law of occupation as *lex specialis*. Many aspects of human rights law and the environment were linked, particularly in the sphere of economic, social and cultural rights, such as the rights to water, food, health and life.

One particularly important aspect in the approach adopted by the Special Rapporteur was the meaning of property rights and guarantees thereof in the context of occupation with regard to protection of the environment. That relationship had been highlighted in the jurisprudence of the Inter-American Court of Human Rights, particularly in relation to indigenous peoples' land.

Some of the specific provisions on property rights established by the law of occupation were considered to apply to natural resources conceived as "property within the occupied territory".

In that sense, as set forth in article 55 of the 1907 Hague Regulations and as explained by the Special Rapporteur, the occupying State administered the natural resources situated in the occupied territory through the "usufructuary rule", which concerned the limitations to the occupying State's use of public property in the occupied territory. The occupying State must utilize natural resources only to the extent of military necessity, the principle of permanent sovereignty over natural resources being customary in nature in accordance with the jurisprudence of the International Court of Justice. In line with the foregoing, the occupying State must not act in a wasteful way and, from a more contemporary perspective, must avoid overuse and pollution. In that connection, it seemed appropriate to invoke self-determination with regard to the exploitation of natural resources in occupied territories, particularly in the case of territories which were not part of any established State. It was also appropriate to stress the utilization and protection of water resources in relation to situations of occupation; the occupying State had the duty to protect the water resources so that their quantity or quality was not seriously impaired.

He also agreed with the Special Rapporteur that a further limitation that provided protection to natural resources and other components of the environment was contained in the general prohibition on destruction or seizure of property, whether public or private, movable or immovable, in the occupied territory unless such destruction or seizure was rendered absolutely necessary by military operations.

On the other hand, the competences of the occupying State were also curtailed by the duty to restore and maintain public order and civil life in the occupied territory. Article 64 of the Fourth Geneva Convention of 1949 made provision for the occupying State to legislate when necessary for the maintenance of public order and civil life and to change legislation that was contrary to established human rights standards.

In the same vein, although the conservationist principle must be preserved in terms of maintaining the *status quo* that had existed prior to the occupation, in combining the application of article 43 of the Hague Regulations with article 64 of the Fourth Geneva Convention, it was fundamental to appreciate that "civil life" and "orderly government" were evolving concepts. As the Special Rapporteur had pointed out, the longer an occupation lasted, the more evident the need for some changes so as to avoid stagnation and to allow the occupying State to fulfil its duties under the law of occupation. The foregoing did not imply acceptance of the controversial concept of "transformative occupation", given that, although the occupying State had to take into account certain considerations, such as public order, civil life and welfare in the occupied territory, it could not introduce permanent changes in fundamental institutions of the occupied territory. The occupying State in turn had a general obligation to respect the environment in the occupied territory and to take environmental considerations into account in the administration of the territory.

The occupying State was expected to administer the occupied territory for the benefit of the occupied population. Based on article 43 of the 1907 Hague Regulations, the Special Rapporteur stressed that the occupying State had a general obligation to respect the environment in the occupied territory and to take environmental considerations into account in the administration of such territory. He agreed both with that assertion and with the assertion that that obligation also found support in key human rights such as the rights to food, water and life, which were closely linked to the protection of the quality of the soil and water, and even biodiversity, to ensure viable and healthy ecosystems.

In addition, as featured in the Special Rapporteur's report, it was also worth stressing the relationship between international humanitarian law and human rights law,

insofar as some rights might be matters of one or the other branch of international law or of both branches. It was also worth emphasizing that, according to international jurisprudence, human rights instruments to which the occupying State was a party continued to apply with respect to acts committed in occupied territories. In the same vein, it was worth highlighting the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had confirmed the applicability in the Occupied Palestinian Territory of the International Covenant on Civil and Political Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The Court had also highlighted, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that international human rights instruments were applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

Human rights law, as noted by the Special Rapporteur, might provide specifications for the interpretation of the notion of "civil life" or a more exact formulation of the obligations of States with regard to ensuring "public health". It was feasible to affirm the complementarity of both sets of rules, while recalling that the law of occupation continued to provide the general framework for the occupying State's action and that the responsibilities falling on the occupying State were commensurate with the duration of the occupation.

He agreed with the Special Rapporteur that environmental degradation might be linked to the violation of several human rights, such as the right to life, right to private and family life, right to health or right to food. As the Inter-American Court of Human Rights had concluded in Advisory Opinion OC-23/17 of 15 November 2017, on environment and human rights, the right to a healthy environment was a fundamental human right.

In addition, in line with article 56 of the Fourth Geneva Convention of 1949, the occupying State had the duty of ensuring public health in the occupied territory, focusing not only on the aftermath of the cessation of hostilities and combating the spread of contagious diseases and epidemics, but also on longer-term public health issues.

The advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* undoubtedly provided important support to the claim that international environmental law continued to apply in situations of armed conflict. On that basis, as the Special Rapporteur stated in her report, international environmental law, both customary and conventional, continued to play a certain role in situations of occupation.

At the same time, the responsibility not to cause damage to the environment fell under customary international environmental law. The principle of "due diligence" was key in terms of the responsibility not to cause damage to the environment of other States or to areas beyond national jurisdiction. There was no doubt that it applied to occupying States in occupied territories under their control or *de facto* jurisdiction and that they were required to prevent significant transboundary harm. That assertion was supported by the advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, by virtue of which physical control of a territory, and not sovereignty or legitimacy of title, was the basis of State liability for acts affecting other States, and by the Commission's draft articles on prevention of transboundary damage from hazardous activities, according to which that obligation applied to activities carried out within the territory or otherwise under the jurisdiction or control of a State.

The occupying State must therefore observe the no harm or due diligence principle so as to prevent serious transboundary harm to the environment of third States. In that

regard, he agreed with the emphasis the Special Rapporteur had placed on the fact that the occupying State, on a temporary basis, became subject to the rights and obligations regarding watercourses, lakes, maritime areas or other transboundary water resources, which included the obligation not to cause significant harm to the environment of other States or areas beyond national jurisdiction.

A reading of article 55 of the Hague Regulations of 1907, on the exploitation of the natural resources of the occupied territory by the occupying State, supported the assertion that the rules of usufruct prohibited predatory exploitation that would put a significant stress on the environment. In that regard, the sustainable use of natural resources in the occupied territories must be kept in mind; that concept should be understood as combining exploitation interests with environmental and social concerns.

He was of the view that it would have been preferable to place each of the proposed draft principles next to the relevant text supporting it. Doing so would not prevent them being included as a whole at the end of the report.

Like other members who had already taken the floor, he was of the opinion that draft principle 19 ought to specify the human rights obligations of the occupying State for the benefit of the population of the occupied territories, in particular the right to health, which, as the Special Rapporteur explained, had significant implications for environmental protection in those territories.

In the light of the foregoing, he agreed that the draft principles proposed by the Special Rapporteur should be sent to the Drafting Committee. He also agreed with the proposal that the second report should address non-international armed conflicts; he hoped that the Commission would be able to complete its first reading of the topic in 2019.

Mr. Ouazzani Chahdi, after thanking the Special Rapporteur for her well-researched report, said that he wished to make a few general observations before commenting on the draft articles and other questions addressed by her at the end of the report.

Her approach to the topic, which took account of new trends in international law while drawing from a number of complementary areas of law, including the law of occupation, the law of armed conflict, environmental international law and human rights international law, was commendable. That said, the direct impact of such types of international law on the environment was not always clear. That was perhaps due to the fact that the environment had not been an issue for discussion at the time of the drafting of the Hague Regulations of 1907. It was not until the adoption of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) that provisions on the protection of the environment during armed conflict had been enacted, specifically in article 55 of the Protocol. The issue was further complicated by the fact that most environmental treaties did not contain express provisions on their applicability in case of armed conflict.

Another issue he wished to address concerned the need to define and clarify some of the concepts referred to in the report. For example, the concept of "occupation" should be made more precise in order to avoid situations that did not fall into the category of an armed occupation, as defined in article 42 of the Hague Regulations and supplemented by the Commentary of 2016 of the International Committee of the Red Cross on article 2 common to the four Geneva Conventions relating to the protection of victims of international armed conflicts (Geneva Conventions of 1949). Likewise, clarification of the concepts of "calm occupation" and "volatile occupation" would be appreciated, as would an elucidation of "transformative occupation". The term "armed conflict" might also have been more specifically defined. Even though "armed conflict" and "environment" had been defined provisionally in the preliminary report of the former Special Rapporteur

(A/CN.4/674), it might have been useful to include the definition of "armed conflict" in the current Special Rapporteur's report, by referring, for instance, to article 2 of the draft articles on the effects of armed conflicts on treaties and to the commentaries thereto. The notion of "occupying Power" also warranted further clarification. In its judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had set out the criteria used to reach its conclusion that Uganda was the occupying Power in the meaning of the term as understood in the *jus in bello* in Ituri district at the relevant time and that as such it was under an obligation, according to article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the Democratic Republic of the Congo.

It was clear that the competence of the occupying State with regard to property rights was very limited. In referring to article 55 of the Hague Regulations of 1907, which laid down the so-called "usufructuary rule", and article 53 of the Hague Regulations, which set out other limitations in respect of the occupying State, the Special Rapporteur rightly concluded, in her report, that the latter article made no mention of natural resources, but could be seen to cover crude oil that was extracted from the soil. During the Second World War, courts had ruled that an occupying State did not have the right to exploit crude oil since oil was not a "munition of war" within the meaning of article 53 of the Hague Regulations. The Special Rapporteur also cited the Singapore Oil Stocks case, as supporting the position that underground crude oil was immovable property. The issue of oil exploitation had arisen during the Israeli-Arab conflict with regard to the exploitation by Israel of the oil fields located in Sinai and the Gulf of Suez.

He supported the proposals made by the Special Rapporteur concerning the "conservationist principle", but had some reservations about how the phrase "unless absolutely prevented" and the word "essential" contained in article 43 of the Hague Regulations and in article 64 of Fourth Geneva Convention, respectively, had been interpreted — namely, to allow the occupying State the competence to legislate in certain situations.

Chapter II of the report on protection of the environment in situations of occupation through international human rights law was a useful contribution, in that it explained the complementarity between the law of occupation and international human rights law and the interrelationship between the protection of the environment and human rights. Like other members of the Commission, however, he wondered whether too much of the report focused on the right to health, leaving too little room for the right to life, which received only a brief mention in paragraph 64, whereas article 55 of Additional Protocol I mentioned not only "the health" but also "the survival" of the population. The right to food and the right to water, which were enshrined in legal texts such as the 2014 Constitution of Tunisia, were also essential and warranted a separate mention.

Turning to the draft principles themselves, he said that, like the previous draft principles under the current topic, they should be given headings. It might also be advisable to formulate a principle on the responsibility of the occupying State. He supported the inclusion of a reference to the sovereign rights that a territorial State was entitled to exercise over any adjacent maritime areas was problematic, as maritime areas were an integral part of a State's territory. He supported the proposal that the phrase "unless absolutely prevented" should be clarified in the commentary to the draft principles. As for the bibliography, which was useful overall, he suggested that, in future, scholarly writings should be identified separately for even easier perusal. Lastly, the Commission should take a cautious approach in its future work on the topic, so as to further explore the concept of non-international armed conflict without politicizing it.

In conclusion, he recommended referring the draft principles proposed by the Special Rapporteur to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that, as had been the case with previous reports on the topic, the Special Rapporteur's first report went beyond the considerations related to the protection of the environment in relation to armed conflict.

The fact that the report pointed to a number of relevant norms that allowed for a dynamic interpretation of the law of occupation made it possible to overcome the fact that rules of occupation law had been developed prior to the regime on the protection of the environment. Nevertheless, the relevance of such an approach should be explained. He agreed with the decision to group together the draft principles that specifically referred to situations of occupation in Part Four of the outcome, which might be entitled "Principles applicable to situations of occupation", as had been suggested by several colleagues.

Although, as noted by the Special Rapporteur in paragraph 24 of her report, the Commission had not yet decided whether there was a need to address the use of terms in the context of the draft principle, he was of the view that, for greater legal precision, the Commission should include a definition of the concept of occupation, as proposed by the Special Rapporteur in paragraphs 19 to 23, which reproduced the definition given by the International Committee of the Red Cross. In that regard, in the commentary to draft article 2 on the effects of armed conflicts on treaties, the Commission stated that it considered it desirable to include in the definition of armed conflict situations involving a state of armed conflict in the absence of armed actions between the parties. Thus, the definition included the occupation of territory which met with no armed resistance. In her report, the Special Rapporteur did not address the difference between belligerent occupation and non-belligerent occupation and its potential impact on the regime of protection of the environment in relation to armed conflicts; such a point warranted further analysis.

With regard to the regime of occupation, the Special Rapporteur had expertly explained the tension and overlap between the conservationist principle and the obligation to guarantee public order and normal life in an occupied territory. Nevertheless, it would be useful for the Special Rapporteur to elaborate on the interaction between the two, with particular emphasis on the protection of the environment and on the tools and considerations that should be taken into account with a view to resolving potential conflicts.

Although the Special Rapporteur, in her report, laid out the potential impact of the particular qualification of a natural resource under municipal law in determining the protection afforded it by the 1907 Hague Regulations, she did not express an opinion on whether such a qualification could result in a lack of protection for natural resources that warranted protection under standards of international law. Nor did she mention any tools that might provide a solution in situations where protection was lacking. Furthermore, the Special Rapporteur reviewed the exceptions to protection of immovable private property on the basis of military necessity, but did not explain her understanding of the concept of "military necessity".

He welcomed the inclusion of environmental considerations as an operative element to be taken into account by the occupying Power with a view to safeguarding the capital of natural resources. Noting that the Special Rapporteur's report made only a tangential reference to the concept of transformative occupation, he wondered if it might be helpful to elaborate on that concept, to the extent that doing so might clarify the content and scope of the obligations of the occupying Power in respect of the protection of the environment.

The section on the protection of the environment through human rights law as a complementary regime was useful. In addition to the indirect protection of the environment through the right to health, it might be advisable to include other tangential forms of protection through other types of rights, such as the right to life, from the viewpoint of

international humanitarian law, or the right to work, as had been suggested by other colleagues. It would be further useful to carry out a more in-depth analysis of the interaction between the potentially applicable legal regimes and to determine the scope of those interactions, since the various regimes could alter the standards of others, within the framework of the current topic.

As he had pointed out in the past, the Commission's work on the topic appeared to focus on the natural environment without any consideration being given to the natural environment's pecuniary value or usefulness to humans. Reports by the United Nations Environment Programme dating back to 2009 had drawn attention to the intrinsic value of natural resources that were in some way useful or had some value for mankind. Although the Special Rapporteur's report included new perspectives, it was important to maintain a comprehensive view of the topic that encompassed all aspects of the environment.

He welcomed the Special Rapporteur's analysis of the obligations of the occupying Power in respect not only of the protection of the environment of the occupied territory, but also of the transboundary responsibility it carried in relation to other States. Nevertheless, the Commission should consider the possibility of natural resources' being under the control of both the occupying Power and the occupied State. In particular, the Commission should examine situations that necessitated cooperation between the occupying and occupied States, for instance, to determine the environmental impact or to jointly administer the natural resource in question.

While in the report was explained the functional approach to the law of occupation, which allowed for a gradual application of the latter, it was not made explicit how that might affect the protection of the environment in relation to armed conflicts, how the applicable regimes interacted or which obligations or principles might be relevant in seeking solutions. It was particularly important to analyse the impact of the time and duration of the occupation on the obligations of the occupying Power, since the law of occupation was dynamic and its content could vary depending on the duration of the occupation and, thus, alter the obligations of the occupying Power.

A temporal approach to the topic was not necessarily the best approach, as it could lead to artificial divisions, upon which, as discussed in the Special Rapporteur's report, the applicable law would depend. That was particularly true with regard to the law of occupation: occupation could occur in any of the phases — before, during or after an armed conflict. As a result, the Special Rapporteur's attempt to link her study of the law of occupation with the law of armed conflict — the most general of the legal regimes — created a certain tension with regard to the application of the concepts, as the Special Rapporteur herself had pointed out. From the report it was not clear whether a different standard for the protection of the environment existed for occupations that took place during, before or after an armed conflict, nor was the reasoning behind such a potential differentiation clear. Likewise, despite stating that the limitations on the law of occupation become increasingly apparent the longer an occupation lasted, the Special Rapporteur did not indicate whether there were standards or legal tools for dealing with such limitations.

The fact that the Special Rapporteur had identified four (draft principles 15, 16, 17 and 18) of the five draft principles in Part Three as requiring clarification with regard to their relationship to situations of occupation raised doubts as to whether the legal technique being used was the most appropriate. Those concerns notwithstanding, the identification of such draft principles was useful and he supported their clarification in the relevant commentary. Furthermore, the Special Rapporteur should explain why she had identified draft principle 6, pertaining to Part One, as requiring clarification, while at the same time claiming that the relevance of the draft principles in Part One to situations of occupation "did not seem to be in doubt".

It was important to analyse the consequences of clarifying the applicability of certain draft principles to situations of occupation and of not clarifying others; that was relevant particularly to draft principle 14, but also to all those in Parts One and Two. Such a consideration was important even for those draft principles included in the potential Part Four, specifically relating to situations of occupation. He supported the proposal to include a *mutatis mutandis* clause with regard to the rest of the draft principles.

As for the new draft principles proposed in the report, he supported the Special Rapporteur's suggestion to replace the passive voice with the active voice in draft principle 19. He agreed with other members of the Commission that the latter half of paragraph 1 of draft principle 19 was unnecessary and that adjacent maritime areas could be dealt with in the commentary to the draft principle in question. In that regard, he understood that, according to the judgment of the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the inclusion of such areas in the occupied territory was based on a factual assessment of effective control over such areas. Nevertheless, it would be necessary to clarify, in the commentary, the environmental considerations to be taken into account, which could include a study on the existence of procedural rights related to the protection of the environment as part of future work.

He further pointed out that, in the Spanish text of draft principle 19 (1), the words "*en la administración del territorio ocupado*" should be replaced with "*de la administración del territorio ocupado*"; otherwise, the reference to "*las consideraciones ambientales*" should be made explicit. It would not be superfluous to include, in the commentary to draft principle 19, the resources-related constraints imposed on the occupying Power and the need to cooperate for the purpose of rebuilding environmental governance institutions in the domestic administration of the occupied territory.

He welcomed the alignment of the wording of draft principle 19 (2) with that of article 43 of the 1907 Hague Regulations in respect of the phrase "unless absolutely prevented", while noting that it would be important to elaborate on the concept behind the phrase in the commentary to draft principle 19.

As to whether the term "occupying Power" should apply to States alone or whether it could be extended to apply to international organizations, it was necessary to determine whether an international organization had the necessary competence according to its statute and whether it was actually capable of establishing and exercising control over the territory in question, in accordance with article 42 of the Hague Regulations. Lastly, as other Commission members had already mentioned, the term "sustainable use" in draft principle 20 should be explained.

With regard to draft principle 21, the replacement of the phrase "the measures at its disposal" with "the means in [its] power", in line with article 43 of the Hague Regulations, would confer the appropriate level of responsibility on the occupying Power. In addition, the commentary to draft principle 21 might include a reference to coordination and cooperation in the administration of both transboundary natural resources and natural resources subject to the jurisdiction of the occupying and occupied Powers.

With regard to the Commission's future work on the topic, he proposed, with a view to comprehensiveness, that the Special Rapporteur should review the settlement of disputes that arose relating to the effects on the environment of armed conflicts and relevant mechanisms. He furthermore supported the proposal that future work on the topic should involve examining how the temporal approach adopted by the Commission could be applied to situations of occupation.

In conclusion, he was in favour of referring all the draft principles proposed by the Special Rapporteur to the Drafting Committee, taking into account the comments made in the debate.

The meeting rose at 12.40 p.m.

Provisional

For participants only

9 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3431st meeting
Held at the Palais des Nations, Geneva, on Tuesday, 17 July 2018, at 10 a.m.

Contents

Protection of the environment in relation to armed conflicts (*continued*)

Organization of the work of the session (*continued*)

Succession of States in respect of State responsibility

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

Ms. Lehto (Special Rapporteur), summing up the debate on her first report, said that the applicability of the law of occupation to international organizations had been raised by many members of the Commission. A number had favoured addressing the issue in the draft principles or commentaries, although Mr. Murase and Sir Michael Wood had expressed doubts in that regard.

It had often been held that the law of occupation could be relevant to international territorial administration, particularly to missions of the United Nations, provided that such administration entailed the exercise of functions and powers over a territory comparable to those of an occupying State under the law of armed conflict, as in the case of the United Nations Interim Administration Mission in Kosovo. The possibility had been raised either as the *de jure* application of occupation law, whenever the criteria based on article 42 of the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) were met, or as application *de facto*. In practice, applicability *de jure* would be rare in the case of United Nations missions as it would require the mission in question to meet the criterion of non-consensual presence, while most such missions relied on the consent of the territorial State. Those who argued for *de facto* application referred to the many practical problems common to the various forms of foreign or international territorial administration. They pointed out that the law of occupation could usefully complement the mandate laid down in relevant United Nations Security Council resolutions, giving guidance and inspiration on how to deal with the various practical issues involved, which ranged from the taking and use of property to the treatment of detainees. Many prominent experts in international humanitarian law agreed with that view, stressing the importance and relevance of at least the substantive rules of occupation law to the administration of territory under the auspices of the United Nations. The question had also been addressed by the International Committee of the Red Cross in a report published in 2012 on occupation and other forms of administration of foreign territory.

There was nevertheless very little actual practice of any recourse to the law of occupation for such purposes. The only two cases of operations authorized by the United Nations in which the law of occupation had been applied *de facto* to the conduct of operations were the Unified Task Force in Somalia and the International Force in East Timor. In both cases, the Australian contingent had declared itself bound by the law of occupation, although operations had not been conducted under the command and control of the United Nations.

The United Nations had not yet embraced the idea and had never considered itself an occupying Power even *de facto*, nor were there currently any United Nations operations for which the law of occupation would be relevant. In that sense, the applicability of the law of occupation to other forms of territorial administration remained a somewhat theoretical possibility, which led her to think that the issue would not be mature enough to be addressed in the draft principles. If members nevertheless wished to do so, she would listen carefully to their arguments. It would be possible to replace the term "occupying State" in the draft principles with "occupying Power", which would be broader and could leave the door open to further developments. An explicit clarification to that effect could be included in the commentary, thereby also responding to Mr. Grossman Guiloff's concern about avoiding generalizations that excluded the applicability of the law of occupation to international organizations.

Mr. Murase had suggested that there might be a reason to formulate separate provisions for belligerent occupation and pacific occupation. While that distinction had played an important role historically, it had lost much of its significance. After the signing of the Charter of the United Nations, which enshrined the general prohibition on the use of force, the concept of pacific occupation could apply only to occupations based on an agreement or other consent of the territorial State. As Mr. Sturma had noted, the presence of foreign armed forces in such a case was governed by the terms of the agreement, not by

the law of occupation. She agreed that such situations were largely covered by draft principles 7 and 8.

The report focused on belligerent, or military, occupation, in which respect she agreed with the points made by Mr. Park, Mr. Nguyen, Sir Michael Wood and Ms. Escobar Hernández; however, she saw no reason to include the term "belligerent occupation" in the draft principles. While legally correct, it was interchangeable with the simpler term "occupation", which was widely used and rarely gave rise to misunderstandings. The Manual on the Law of Armed Conflict of the United Kingdom, for example, used the term "occupation" rather than "belligerent occupation", as did the Geneva Convention relative to the Protection of Civilian Persons in time of War (the Fourth Geneva Convention) and the Hague Regulations.

Mr. Park had suggested that the draft principles should differentiate more among situations of occupation in terms of nature and duration. "Protracted occupation" had been used in the report as a descriptive term, not as a distinct legal category. The law of armed conflict did not distinguish between different types of occupation. As Mr. Hmoud had said, the type and duration of occupation did not affect the applicability of international humanitarian law as *lex specialis*. At the same time, the obligations of the occupying State under the law of occupation were to a certain extent dependent on the prevailing situation. As had been highlighted by the International Committee of the Red Cross in its commentary to common article 2 of the Geneva Conventions of 1949, negative obligations — mostly prohibitions — under the law of occupation applied immediately, whereas the implementation of positive obligations depended on the level of control exerted, the constraints prevailing in the initial phases of the occupation, and the resources available to the foreign forces. The responsibilities falling on the occupying State were commensurate with the duration of the occupation. As a certain degree of flexibility in the implementation of the law of occupation was recognized, she saw no need to introduce any differentiation into the draft principles, although the commentaries would play an important role in that regard. She agreed with Mr. Nolte that it was sufficient for the commentaries to clarify that the exact scope of the respective obligation depended on the nature and duration of the occupation. A similar point had been made by Ms. Galvão Teles, Mr. Peter, Mr. Grossman Guiloff, Mr. Zagaynov and Ms. Escobar Hernández.

Most speakers had accepted the basic premise that the law of occupation had to be interpreted in the light of more recent rules of international law. As for environmental law conventions, Mr. Park had expressed doubt as to whether the Commission's 2011 articles on the effects of armed conflicts on treaties might apply to occupation; however, the commentary to article 2 (6) thereof defined armed conflict as including occupation of a territory, even when no armed resistance was met.

Concern had also been raised that insufficient attention was paid in that context to the specificities of the law of armed conflict. Sir Michael Wood had questioned whether it was realistic to expect peacetime obligations and standards relative to the environment to be applied in time of belligerent occupation; Mr. Murase had suggested that military necessity prevailed over environmental concerns and that it was permitted to employ any means of warfare available, unless specifically prohibited by the law of armed conflict. Mr. Murphy had queried the fact that the rules of international environmental law were being invoked without any acknowledgement in the draft principles themselves of the unique situation presented by military occupation.

Some of those concerns related directly to the draft principles and could best be addressed in that context, but some were of a general nature. The requirements of the law of occupation as *lex specialis*, as well as the realities of the situation, affected the extent to which other areas of international law, such as human rights law and international environmental law, might complement the law of armed conflict; however, that did not mea.. that humanitarian principles, human rights and environmental considerations could be ignored, even in the heat of armed hostilities, as had been made clear by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, and by the Commission in its work on the topic to date. As for the human rights obligations addressed in the report, it should be recalled that the International Covenant on Economic, Social and Cultural Rights did not provide for derogation. Furthermore, human

rights obligations, including those related to the environment, could not be so interpreted as to be deprived of all meaningful content. The question was not whether certain peacetime rules applied in situations of armed conflict or occupation but how they applied, in which respect she agreed that more research would be needed.

Concerning the legality of occupation, Mr. Peter, Mr. Petrič and Mr. Huang had questioned the applicability of the law of occupation to situations resulting from the unlawful use of force. The question of whether appropriate justification existed for the use of force was essential from the perspective of the Charter of the United Nations; nevertheless, the law of armed conflict applied whenever the criteria of armed conflict — international or non-international — were fulfilled, regardless of the reasons for the conflict. The Head of the Legal Division of the International Committee of the Red Cross had said that references to "unlawful occupation" could be misguiding, as they confused the issue of the lawfulness of the resort to the use of force with the issue of the rules of conduct to be applied once armed force had been used, thereby also obscuring the fundamental distinction between *jus ad bellum* and *jus in bello*, and that, from the perspective of international humanitarian law, occupation law applied equally to all occupations, whether or not they were the result of force used lawfully under jus ad bellum. It should be added that the various war crimes tribunals set up after the Second World War had relied on and interpreted the Hague Regulations and customary law; nevertheless, the issue could be addressed in the relevant commentary if thought helpful.

Several members had commented on the report's focus on the right to health, pointing out that there were other human rights relevant to environmental protection. While other rights were also discussed in the report, the right to health had been taken as an example to illustrate the links between human rights and environmental protection in greater detail. She would endeavour to ensure a better balance among relevant rights in the commentary. Ms. Escobar Hernández's specific proposal to address other rights in the context of the draft principles could be discussed by the Drafting Committee.

The Commission had asked for the relationship between the new draft principles, on occupation, and the draft principles already considered to be clarified. Different views had been expressed on how to achieve that goal. Mr. Nguyen had suggested placing them in part three (Principles applicable after an armed conflict); Mr. Murase favoured part two (Principles applicable during armed conflict). Mr. Park, supported by others, had proposed the inclusion of a separate draft principle to state that the draft principles in parts one, two and three applied *mutatis mutandis* to situations of occupation. Another possibility, as proposed in paragraphs 101 to 104 of the report, would be to include the necessary clarification in the commentary. That proposal had been explicitly supported by Ms. Galvão Teles and Mr. Hmoud, who had also wished to clarify that the relevance of certain post-conflict principles to occupation could not be interpreted as equating the two situations. Whether or not a separate provision along the lines proposed by Mr. Park were to be included, various aspects would need to be clarified in the commentary. She considered that it would be sufficient to address the issue in the commentary but was open to discussion. With regard to potential titles for the new draft principles and for part four of the set as a whole, she welcomed the various comments and suggestions made, particularly by Mr. Park.

The amended version of draft principle 19 (1) that she had proposed in her introductory statement had met with general support. In response to Sir Michael Wood's request for further explanation of what was meant by the words "a general obligation" and what basis there was to speak of such an obligation, she referred to paragraph 50 of the report. The point of departure was article 43 of the Hague Regulations; it was argued that the occupying State's obligation to restore and maintain public order and civil life must be interpreted in the light of current circumstances, including the importance of environmental concerns as an essential interest of all States, as stated by the International Court of Justice, and taking into account developments in international human rights law. As the Israeli Supreme Court had noted, the concept of civil life could not be interpreted to refer to civil life in the nineteenth century but must be given a contemporary content.

Mr. Jalloh and Mr. Nolte had sought clarification of the term "environmental considerations", in which respect it was important to note that environmental considerations were context-dependent and evolving, as pointed out in the commentary to draft principle

11, which employed the same notion. Paragraph (5) of that commentary stated: "Since knowledge of the environment and its ecosystems is constantly increasing, better understood and more widely accessible to humans, it means that environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops." Further details could be included in the commentary to draft article 19.

The latter part of paragraph 1 of draft article 19 had attracted a number of comments. Mr. Murase, Mr. Murphy and Sir Michael Wood did not seem to agree with its content. Mr. Hmoud, Mr. Hassouna, Mr. Cissé, Mr. Nguyen and Ms. Escobar Hernández supported it, with Mr. Hassouna expressly referring to the *Manual of the Laws of Naval War*, published in Oxford in 1913, which was also referenced in the report, together with more recent sources. There had also been suggestions that the issue could be addressed in the relevant commentary. She would not insist on keeping it in the text of the draft principle, taking also into account the comments made by Ms. Galvão Teles, Mr. Rajput, Mr. Jalloh and Mr. Cissé on the notions of "territorial State" and "sovereign rights".

Mr. Rajput had made a slightly different point, drawing a connection between the applicability of the law of occupation to sea areas and the concept of effective control. Mr. Park had referred to the conclusion that the International Law Association had reached, based on the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, to the effect that the obligations of occupying States would vary according to the degree of control they exercised, and had made a specific proposal in that regard. She agreed that effective control was a key concept in the law of occupation, but as that requirement was part of the definition of occupation, it might be sufficient to clarify it in the commentary.

As for paragraph 2 of draft principle 19, the words "unless absolutely prevented", which were taken from article 43 of the Hague Regulations, had been seen as too categorical by Mr. Murphy, who had proposed to introduce the conditions contained in article 64 of the Fourth Geneva Convention. Ms. Oral had made a similar point. Mr. Šturma had pointed out that forward-looking changes to the legislation of the occupied State should not be arbitrary and must take into account the interests of the occupied population. Mr. Rajput, Mr. Huang and Mr. Valencia-Ospina had expressed a preference for the existing version. The final wording could be discussed in the Drafting Committee and further clarification provided in the commentary.

A further proposal concerning paragraph 2 of draft principle 19 had been made by Mr. Hassouna, supported by Mr. Nolte, Ms. Oral, Ms. Escobar Hernández and Mr. Vázquez-Bermúdez, who had pointed out that, in addition to local legislation, the paragraph should make reference to the international obligations of the occupied State. Such an addition could be useful. One example was given in paragraph 87 of the report, concerning the situation in which the occupying State, on a temporary basis, became subject to rights and obligations regarding a watercourse, lake, maritime area or other transboundary water resource that the territorial sovereign shared with other States. She welcomed the suggestion made by a number of members to add a third paragraph to draft principle 19, dealing with the human rights obligations of the occupying State; specific wording could be discussed in the Drafting Committee.

With regard to draft principle 20, several issues had been raised. The first concerned the limits to the occupying Power's right to administer and use the resources of the occupied territory. Ms. Galvão Teles had proposed adding wording along the lines of that used in the 2003 Bruges Declaration on the Use of Force of the Institute of International Law, receiving general and specific support from several members. It was clear that exploitation was not an end in itself, as pointed out by Mr. Cissé. The wording used by the Institute could prove useful in that regard, either in the draft principle or in the commentary; the principle of permanent sovereignty to natural resources, which had been supported by most, should also be taken into account.

The second issue related to the mention of "minimizing environmental harm", which Sir Michael Wood viewed as overlapping with the content of draft principle 19. The issue would need to be considered by the Drafting Committee. According to Mr. Murphy, the

term "minimization" was at odds with the exploitation rights of the occupying State under the Hague Regulations and the Fourth Geneva Convention; however, she recalled that the purpose of the draft principles, as enshrined in draft principle 2, was to enhance "the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict". Ms. Oral had proposed altering the word "minimizes" to "prevents". Mr. Murphy had suggested that the phrase calling for the occupying State to ensure "sustainable use" of natural resources might be read as precluding the use of non-renewable natural resources, but her research indicated that his concerns were groundless, as neither practice nor the literature revealed a categorical distinction being drawn between renewable and non-renewable resources in the context of sustainable use. Moreover, sustainable use could not be equated with precluding exploitation; if necessary, that could be clarified in the commentary.

A further issue related to the very concept of sustainable use of natural resources, or the more overarching concept of sustainable development from which it flowed. Several members had questioned the legal nature of the concept, and a proposal had been made to change the word "shall" in draft principle 20 to "should". It was important to recall, in that regard, that the point of departure for draft principle 20 was article 55 of the Hague Regulations, which was binding as a matter of customary law. Even without referring to the concept of sustainable use, the rights of usufruct, 111 years after the adoption of the Hague Regulations, would need to be interpreted to involve environmental care. It should be recalled that usufruct referred to what was necessary or usual in the exploitation of the relevant resource. In the modern world, "necessary and usual" could not ignore the environment. Given the established status of the concept of sustainability, which combined exploitation interests with environmental and social concerns, particularly in the context of sustainable use of natural resources, there was little reason to replace it with another environmental term.

Ms. Oral had asserted that the adoption by consensus of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals rendered the debate about whether sustainable development was a legal principle or a policy to a certain extent moot, as the principle had been accepted by States at the highest level, and that it would be incongruous for the Commission to appear to be challenging the global consensus. Sir Michael Wood had suggested that draft principle 20 did not add much to draft principle 19 and could be deleted. However, exploitation of natural resources was a major environmental question in its own right. For example, unsustainable use of water resources by an occupying Power in an area that suffered from persistent water scarcity could lead to drought and many other environmental problems. According to the United Nations Environment Programme, fresh water was the most crucial aspect of environmental management in the Occupied Palestinian Territory.

Draft principle 21 had met with broad agreement, but the wording had attracted some comment. The two main alternative sources for wording were the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* and the Commission's 2001 articles on prevention of transboundary harm from hazardous activities. The current text, which was derived from the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), had also been supported as the most recent authoritative formulation of the obligation.

Several members had welcomed the bibliography provided in the report. She encouraged proposals for additional materials in languages other than English.

The programme for future work that she had suggested had been generally supported. Mr. Hassouna and Mr. Petrič had observed that non-international armed conflicts, as well as questions of responsibility and liability, were vast and complex areas of law. Her intention was not to give a comprehensive presentation of those two areas but to address certain questions relevant to the present topic. It could be useful to examine practice and consider what possibilities there were to enhance the protection of the environment in non-international armed conflicts.

Mr. Park and Mr. Jalloh had raised a more substantial question concerning how the classification of armed conflicts was reflected in the topic, seeking clarification as to

whether she intended to change the Commission's practice. They had pointed out that the Commission had not distinguished between international and non-international armed conflict in the draft principles it had previously adopted. That held true for the set of draft principles as a whole, and she agreed with Mr. Jalloh that it would not be advisable to expressly limit the draft principles to one type of armed conflict, given that the development of customary law had tended to progressively reduce the importance of the distinction between international and non-international armed conflicts and could be expected to further develop in that direction. So far, the Commission had nevertheless used different terminology in different draft principles, referring to "States parties", "parties" or "States", depending on whether the relevant measures were intended to be taken by parties to an international armed conflict, parties to a non-international armed conflict, including non-State armed groups, or by any States in a position to do so. Furthermore, where a draft principle drew on existing rules of international law, the commentaries regularly commented on the applicability of such rules in international and non-international armed conflict. It was not her intention to depart from that practice in examining certain issues of environmental harm that were prevalent in contemporary non-international armed conflicts, much less to create new distinctions. As Mr. Cissé had pointed out, her second report would complement the first one, which focused entirely on one aspect of international armed conflicts: occupation.

The Chair said he took it that the Commission wished to refer draft principles 19 to 21 to the Drafting Committee, taking into account the comments and observations made in the plenary.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of protection of the environment in relation to armed conflicts was composed of Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Huang, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Ruda Santolaria, Mr. Saboia and Sir Michael Wood, together with Ms. Lehto (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), ex officio.

Succession of States in respect of State responsibility (agenda item 10) (A/CN.4/719)

The Chair invited the Special Rapporteur to introduce his second report on the topic of succession of States in respect of State responsibility.

Mr. Šturma (Special Rapporteur) said that, owing to time constraints associated with the translation of his second report, he had not included all the elements and draft articles that had originally been planned. He welcomed the comments received from Commission members and from delegations attending the meetings of the Sixth Committee. Although he did not necessarily agree with all of them, they offered a valuable source of inspiration for future work. The Commission's reports and draft articles were, after all, always the outcomes of collective work. With that approach in mind, he wished to draw attention to certain adjustments that might address the concerns and questions raised in previous debates on the topic and preserve its central thrust, as outlined in the first report.

He agreed that it would be sensible to postpone an in-depth discussion of draft articles 3 and 4, which had already been referred to the Drafting Committee. They could easily be held in the Drafting Committee until the other draft articles, notably those on general rules on succession of States in respect of State responsibility, had been provisionally adopted. The Drafting Committee and the Commission would then be in a better position to decide on the final wording and placement of draft articles 3 and 4, which concerned the role of agreements and unilateral declarations, respectively.

Although it had not been his original intention, he accepted the view expressed by some in the Commission that the issue of the legality of succession should also be addressed.

The fact that examples of State succession were rare should not prevent the Commission from formulating certain general and specific rules on succession, or non-succession, in respect of State responsibility. However, he admitted that State practice in that area was diverse, context-specific and sensitive. He would not suggest replacing a highly general theory of non-succession with a similarly general theory of succession. Instead, a more flexible and realistic approach was called for.

While he had advocated, and the Commission had endorsed, a basic level of terminological consistency with the Commission's previous works, the general approach taken did not necessarily have to follow the structure of the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts and other texts on succession of States in respect of areas other than State responsibility. It was important to take into account the differences between the rules on succession of States in respect of State responsibility and those on succession of States in respect of other areas.

The general approach taken towards the topic was informed by an understanding of State responsibility as a complex legal regime under customary international law, one that had in large part been codified by the Commission in its articles on responsibility of States for internationally wrongful acts. Although they were not binding, the Commission's articles on State responsibility undoubtedly constituted one of the most important achievements in the codification of customary international law. They were widely considered to reflect customary international law. It was therefore necessary to take their content into account and to determine whether, and if so to what extent, that content might also apply in situations of succession of States. That approach called for a combination of deductive and inductive methods. The general principles and rules of the articles on State responsibility should be applied or, if necessary, developed to serve as guidance for States facing problems of responsibility in cases of succession.

It seemed necessary to recall the concept of State responsibility. Although there was no need to provide a formal definition of the concept in draft article 2 (Use of terms), it should be explained in the report and eventually in the commentary. According to paragraph (5) of the Commission's commentary to article 1 of the articles on State responsibility, the term "international responsibility" covered the relations which arose under international law from the internationally wrongful act of a State, whether such relations were limited to the wrongdoing State and one injured State or whether they extended also to other States or indeed to other subjects of international law. It was possible to define the concept of State responsibility under contemporary international law as a bundle of principles and rules of secondary character governing in particular the establishment of an internationally wrongful act and its attribution to a given State, the content and forms of responsibility, and the invocation of the responsibility of a State. Although it was not possible to formulate a general rule or rules on succession, or non-succession, for responsibility *in abstracto*, such a rule or rules could be formulated for its principal constituent parts, such as the attribution, content and invocation of the responsibility of a State, whether predecessor or successor.

The determination of the general rules of succession, or non-succession, did not exhaust the topic. Such general rules were subject to exceptions and modifications in response to various factors, such as whether a breach was completed or continuing and whether the State in question continued to exist. The latter aspect seemed to be of particular importance. That was why the continued existence of the predecessor State and the cessation of its existence had been dealt with together in a dedicated section of the report and draft articles.

In addition to addressing certain general rules, the second report also addressed the issue of the transfer of obligations arising from an internationally wrongful act of the predecessor State. In other words, succession of States in respect of responsibility would mean the devolution of the obligation of reparation from the predecessor State to the successor State.

The report included seven new draft articles. As he had already indicated, he had in mind two or three further draft articles that would concern the content of responsibility.

They would address the possible impact of succession of States on various obligations arising from State responsibility, namely restitution, compensation and assurances of non-repetition. Those issues would be addressed in the third report.

Draft article 5 related to general rules and therefore needed to be dealt with at an early stage in the Commission's work on the topic. After some hesitation, he had eventually decided to include a chapter on the issue of legality of succession. He had done so partly for the sake of consistency with the 1978 and 1983 Vienna conventions, the 1999 articles on nationality of natural persons in relation to the succession of States and the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility, all of which addressed the issue of legality.

He admitted that the legality of succession was a controversial issue. The Commission had discussed it in the 1970s. As the Special Rapporteur for the topic of succession of States in respect of treaties, Sir Francis Vallat, had rightly noted in paragraph 174 of his first report (A/CN.4/278 and Add.1-6), the concept of "succession of States" was defined in paragraph (3) of the commentary to draft article 2 as "the fact of the replacement of one State by another" without any indication as to whether it had occurred in a lawful or unlawful manner. Succession conceived as a "fact" might be in conformity with international law, as in the case of cession on the basis of a treaty, but it might also occur in violation of international law, as in the case of the annexation of the territory or part of the territory of a State. There were also cases in which it was not clear whether the fact giving rise to succession was lawful, unlawful or simply not governed by international law. He wished to point out that the cases presented in the report served only as examples. He made no claims regarding their completeness and did not pass judgment on any of them other than those in which illegality had clearly been established. In view of those considerations, he had ultimately decided to include draft article 5, which was modelled on article 6 of the 1978 Vienna Convention. It should be noted that succession in respect of State responsibility entailed not only the transfer of obligations but also the transfer of rights.

Draft article 6 also related to general rules. It reflected the approach explained in the introduction of his second report. The general rule that it advanced was based on the principle of non-succession with regard to the establishment of an internationally wrongful act. In other words, under draft article 6 (1), the fact of succession had no impact on the attribution of responsibility for an internationally wrongful act committed before the date of succession. That was because the conduct attributed to the predecessor State had been and remained the wrongful act of that State. The implication was that, if the predecessor State continued to exist, the injured State or subject could, even after the date of succession, invoke the responsibility of the predecessor State and claim reparation from it for the damage caused by the internationally wrongful act.

Chapter III of the second report included an analysis of the distinction between an instantaneous breach and a breach having a continuing character and of the issue of composite acts and their possible impact on the succession of States in respect of State responsibility. On that basis, draft article 6 (3) provided that the general rule was without prejudice to the possible attribution of the internationally wrongful act to the successor State on the basis of the breach of an international obligation by an act having a continuing character if it was bound by the obligation. However, that general rule did not preclude the possibility of exceptions. On the contrary, draft article 6 (4) made it clear that, notwithstanding the provisions of draft article 6 (1) and (2), the injured State or subject could claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States.

That provision served as a bridge to draft articles 7 to 11, which developed and modified the general rule. In other words, their purpose was to identify the circumstances in which the obligations arising from an internationally wrongful act rested with the predecessor State and those in which they passed to the successor State. That process required a focus on specific categories of succession.

Chapter IV dealt with cases of succession in which the predecessor State continued to exist. Although it was divided into four sections, only three draft articles were proposed in it. The reason was that section B contained an analysis of the issue of responsibility for

the conduct of insurrectional or other movements on the basis of article 10 (2) of the articles on State responsibility. That analysis was important, as it showed that, in its previous work, the Commission had already envisaged one situation in which a State was responsible for acts that had taken place before its creation. However, that case was different from succession of States *stricto sensu*, in that it was not the act of the predecessor State but that of a non-State actor, insurrection or other movement that succeeded in establishing a new State in part of the territory of a pre-existing State. Therefore, the rule was reflected not in a dedicated draft article, but in draft articles 7 and 8, as an exception. Those draft articles dealt with the separation of parts of a State (secession) and the establishment of newly independent States, respectively.

Draft articles 7 and 8 were broadly similar. They both represented departures from the general rule that the obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State. In addition to providing for an exception to that general rule for the conduct of an insurrectional or liberation movement, draft articles 7 and 8 also provided for exceptions in particular circumstances, including the existence of a direct link between the act or its consequences and the territory of the successor State or States. In the case of secession, it might also be the case that the act had been carried out by an organ of a territorial unit of the predecessor that had later become an organ of the successor State.

Those two circumstances could also constitute exceptions to the general rule of non-succession in draft article 9, which concerned the transfer of part of the territory of a State. As cession was typically executed on a consensual basis, the possibility that responsibility for the conduct of an insurrectional or other movement might devolve upon the successor State had not been included in that category of succession.

Chapter V addressed cases of succession in which the predecessor State did not exist. Draft article 10 (Uniting of States) covered two situations, namely the merger of two or more States and the incorporation of one State into a second, pre-existing State. For the purpose of the proposed draft articles, there was no substantial difference between the two scenarios, as the obligations arising from an internationally wrongful act passed to the successor State in both cases. However, the States concerned, including an injured State, might agree otherwise.

Draft article 11 concerned the dissolution of a State. Dissolution was possibly the most complex category of succession, as it resulted in at least two successor States to which, to a greater or lesser extent, responsibility for an internationally wrongful act of the predecessor State and its consequences could be attributed. Relevant factors in that regard included territorial links, relations with the population of such States and any economic or other advantages arising from the wrongful act. Therefore, emphasis was placed in that draft article on the role of agreements that should be negotiated by successor States in good faith.

Going forward, he intended to follow the programme of work outlined in his first report, while allowing for some degree of flexibility. A number of adjustments had been indicated in part one of the second report. In addition, the newly identified issue of forms and invocation of reparation required further analysis, which might eventually give rise to additional draft articles. Time constraints had prevented him from addressing that issue in the second report. The Commission might also wish to include some other definitions in draft article 2.

The third report, which would be submitted in 2019, should thus focus on the transfer of the rights or claims of an injured predecessor State to its successor State. The fourth report, which would be submitted in 2020, could address procedural and miscellaneous issues, including cases in which there was a plurality of successor States and therefore a question of shared responsibility, and the possibility of applying rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals. Depending on the progress of the debate and the Commission's overall workload, it should be possible to adopt the entire set of draft articles on first reading in 2020 or 2021.

Mr. Park said he was glad that the Special Rapporteur had responded to the point raised by many members at the previous session, himself included, by discussing different categories of State succession in the second report. Although many members had expressed concern that there were insufficient examples of State practice related to the topic and that intricate questions were involved, he agreed with the Special Rapporteur's observation in paragraph 13 of the report that there was a need for international law to serve as a framework able to ensure legal security and stability in international relations. In his view, the Commission's work on the topic would fill a gap between the regimes of State succession and State responsibility and help bring clarity and predictability to the issue.

Concerning the Special Rapporteur's general approach to the topic, he agreed with the decision to address the issue of legality of succession at an early stage as a general provision of the draft articles. He supported the Special Rapporteur's suggestion that the Commission's discussion should not aim to replace the general theory of non-succession with a similarly general theory in favour of succession, but to provide "a confirmation of non-succession in certain legal relations arising from State responsibility and a formulation of special rules (or possible exceptions) on succession in others". He himself had advocated such an approach at the previous session. However, some parts of the report appeared to depart from the intention of finding exceptions to the general theory of non-succession and to come closer to replacing the general rule of non-succession. For instance, in dealing with cases of succession where the predecessor State did not exist, the Special Rapporteur contended, in paragraph 148, that "the general rule of non-succession should be replaced rather by a presumption of succession in respect of obligations arising from State responsibility". Regardless of the existence of a predecessor State, in his view the starting point or presumption should be the non-succession rule, and the conditions or exceptions would differ depending on the categories of succession and the interested parties. The clarification and identification of exceptional cases in the context of the general theory of non-succession would be the most important aspect of the topic, and it was important to maintain logical consistency in expressing general rules and exceptions.

With regard to terminology, he was in favour of using the terminology of previous works of the Commission, without necessarily following the structure of the 1978 and 1983 Vienna conventions on State succession. He also agreed that the concept of State responsibility should be explained in the commentary.

The report dealt with the transfer of obligations arising from the internationally wrongful act of the predecessor State according to categories of State succession. He agreed with the methodology of grouping cases of succession into two types — where the predecessor State continued and where it no longer existed — as that would avoid unnecessary repetition of rules and exceptions for every case of succession. Noting that the report dealt only with the transfer of obligations arising from the internationally wrongful act of the predecessor State, and that the Special Rapporteur had indicated that he would discuss the transfer of the rights or claims of an injured predecessor State to the successor State in his third report, he wondered whether the intention was to add the rights and claims to the draft articles on the transfer of obligations proposed in the current report or to suggest a separate set of draft articles for such rights or claims. The latter approach would lead to inevitable duplication. He noted that the Institute of International Law dealt with rights and obligations together in the same article in its resolution on succession of States in matters of international responsibility.

It would be necessary to give some consideration to the subsidiary nature of the set of draft articles proposed in the second report. The Special Rapporteur had noted in paragraph 86 of the first report that the rules to be codified should be of a subsidiary nature; that general rule should also be articulated as a provision of the draft articles. In its resolution on the topic, the Institute of International Law had recognized the subsidiary character of its guiding principles, stating that they applied in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or other subject injured by the internationally wrongful act.

Turning to the proposed draft article 5, he noted that the requirement for succession to be in conformity with international law was based on the 1978 and 1983 Vienna conventions and on practices reflecting the principle that no territorial acquisition resulting

from the threat or use of force should be recognized as legal, as set out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. That was consistent with the fundamental principle of *ex injuria jus non oritur*, under which an entity created in violation of international law was not recognized. The legality of succession was also presented as a requirement in article 2 (2) of the resolution of the Institute of International Law. He agreed with the Special Rapporteur's point in paragraph 40 about the rationale for the inclusion of a draft article modelled on article 6 of the 1978 Vienna Convention to clarify the scope of application.

Regarding draft article 6 (1), he agreed with the approach taken by the Special Rapporteur whereby general principles commonly applicable to every situation were discussed before moving on to specific situations. As the Special Rapporteur noted in paragraph 43, it was important to verify to what extent general principles and rules of State responsibility could be applied to situations of internationally wrongful acts where succession of States had occurred. However, he had doubts about the use of the term "attribution" in that context. "Attribution" was used in the context of State responsibility to refer to the "subjective element" of State responsibility, namely the requirement to establish State responsibility. In his understanding, the topic dealt with the transfer of rights or obligations arising from State responsibility after such responsibility had been conclusively established, except in the case of a continuing wrongful act. From the perspective of succession, it was not clear from the current wording — "succession of States has no impact on the attribution of the internationally wrongful act" — whether it referred to a subjective element of State responsibility. He noted that the Institute of International Law had used the adjective "attributable" in its draft article 4 (1) on succession of States in matters of international responsibility: "The internationally wrongful act committed before the date of succession of States by a predecessor State is attributable to this State". He therefore proposed using the word "attributable" if necessary.

Regarding draft article 7, in his view an appropriate title would simply be "Separation of parts of a State", without the addition of the controversial concept of "secession" in brackets after it. That term was employed more specifically to describe instances where the territory was removed without the consent of the predecessor State, while the term "separation" was used to refer to instances where such removal was accepted by the predecessor State. Such consent could be given in the Constitution of the parent State or in some other form, either prior to the declaration of independence or following an initial unilateral declaration. The lack of consent of the predecessor State was the key element that characterized secession *stricto sensu* and explained why it was so controversial in international law.

As for draft article 8, he agreed generally with the Special Rapporteur's reasoning and the proposed draft article. As the 1978 and 1983 Vienna conventions treated the situation of newly independent States differently from other categories of succession, he believed that a separate category was still necessary and was relevant.

He agreed with proposed draft article 9, except for some minor points. For instance, in paragraph 2, he suggested replacing "the obligations ... will transfer to the successor State" with "the obligations ... will pass to the successor State", and "a territorial unit of the predecessor" with "a territorial unit of the predecessor State". In paragraph 3, it was specified that responsibilities were assumed by the predecessor State and the successor State but, depending on the context, it might only be the successor State. That question could perhaps be dealt with in the Drafting Committee.

Given the current situation on the Korean Peninsula, he wished to pay particular attention to draft articles 10 and 11, in which the Special Rapporteur considered situations where the predecessor State no longer existed. In such situations, the Special Rapporteur applied the general rule of succession, contending that if no one were to take responsibility, that would not be consistent with the objectives of international law, including equitable and reasonable settlement of disputes. However, as much as an injured State's rights and claims were important, in his view the consent of the successor State was imperative in assuming obligations arising from an internationally wrongful act committed by the

predecessor State. That view, however, would be more appropriate in a discussion of *lex ferenda*; there was a lack of State practice supporting succession theory.

In draft article 10, the Special Rapporteur dealt with the situation of unification under the title of "uniting of States", the term used in the 1978 and 1983 Vienna conventions. However, the Commission's own articles on nationality of natural persons in relation to the succession of States referred to "unification of States". He personally would prefer to use "unification", as it reflected the terminology used in the most recent work of the Commission. With regard to the specific issue of unification in relation to the need for the successor State's consent, he noted that in draft article 10, which provided for the transfer of obligations to the successor State in cases of both merger and incorporation, paragraph 3 required the consent of the States concerned, including an injured State. To his mind, the basic logic of draft article 10 would be applicable to all situations if the subsidiary nature of the draft article to the general rule was confirmed. In the specific situation of unification, however, he was not sure whether the State practice on which the draft article was based was sufficient to be articulated as a "succession rule" deviating from the general principle of non-succession.

In his analysis, the Special Rapporteur largely relied on the situation of Germany. However, as he noted in paragraph 159, controversy remained as to whether article 24 (1) of the Treaty on the Establishment of German Unity could be interpreted as acceptance by the Federal Republic of Germany of obligations arising from internationally wrongful acts committed by the German Democratic Republic. The case cited in paragraph 160 constituted an exception to the traditional approach of non-succession. In that case, the Federal Administrative Court had *a priori* rejected the idea that the Federal Republic of Germany had responsibility for obligations arising from internationally wrongful acts committed by the German Democratic Republic, but found that it had the obligation to pay compensation because the expropriated property was part of unified Germany. The case had been resolved because the predecessor State's property law had been incorporated into the law of the unified Germany, highlighting the fact that such matters could be resolved by incorporating the law of the predecessor State into the law of the successor State. Nonetheless, it could not be interpreted as the automatic transfer of an obligation to the successor State.

As suggested in paragraph 161, if there was an agreement between the successor State and a third State, obligations arising from internationally wrongful acts committed by a predecessor State that had ceased to exist could continue. However, in the example given in that paragraph the successor State had agreed to take over the obligations arising from the internationally wrongful acts committed by the predecessor State against a third State; again, that could not be regarded as the automatic succession of responsibility. The key factor was the successor State's willingness to resolve the issue by bearing secondary obligations. He would therefore propose revising draft article 10 (3) by adding the words "subject to the consent of the successor State", "subject to an agreement" or some other appropriate phrase to illustrate the need for the successor State's consent. Moreover, in the situation of unification, as in the situation of dissolution articulated in draft article 11, equitable proportion and other relevant factors must be considered. Notwithstanding his criticism, he believed that paragraph 3 of draft article 10 was necessary. While the default principle would be succession subject to the consent of the successor State, certain agreements entered into by the parties concerned, including an injured State, could supersede that principle.

Regarding draft article 11, he had some comments on the Special Rapporteur's approach. In paragraph 189, the Special Rapporteur noted that a transfer of obligations could take place "according to or in the absence of an agreement". He agreed with the more cautious approach taken in draft article 11 (1), which stated that "the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States". Indeed, he did not see the two International Court of Justice cases cited — *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* — as supporting the argument that a transfer of obligations could take place according to or in the absence of an agreement, but rather as emphasizing the

need for the consent of the interested parties. He recalled that, at the previous session, he had provided his own interpretation of the *Gabčíkovo-Nagymaros Project* case, namely that the Court had not clearly recognized the obligations of Slovakia resulting from the transfer of secondary obligations arising from the responsibility of Czechoslovakia, but instead had noted the effect of the special agreement concluded between the parties in respect of rights and obligations relating to the *Gabčíkovo-Nagymaros Project* case.

In paragraph 179, the Special Rapporteur noted in respect of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide that the judgment seemed to be the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession. However, it was his understanding that the Court had not clarified the issue of the transfer of obligations arising from State responsibility. Even though the Court had not accepted the argument of Serbia rejecting the existence of general international law on succession of State responsibility, it had not needed to decide on the question. Thus, he agreed that it should be specified in draft article 11 (1) that secondary obligations were transferred "subject to an agreement".

Concerning future work, the Special Rapporteur had indicated that he would discuss in the third report the transfer of rights or claims of an injured predecessor State to the successor State. In his view, if it wished to work efficiently, the Commission would need to consider carefully whether rights and obligations should be dealt with in separate sets of articles or not.

Sir Michael Wood said that, for the most part, the second report was very readable. It was clear and concise, yet gave the reader sufficient information to assess the proposed draft articles, even though the topic was complex and there was often little practice or case law to draw on. It was particularly helpful that each proposed article was set out immediately after the section which formed its basis. He was glad that the Special Rapporteur had taken account of the Commission's debate on the first report and the debate in the Sixth Committee. At the Commission's sixty-ninth session, he himself had pointed out that the first report did not provide an in-depth or systematic account of the materials, and had asked about the Special Rapporteur's plans for making such materials available – whether, for example, he intended to propose that the Commission should request States to provide an account of their practice and case law on the matter, and whether it would be useful for the Commission to request a study from the Secretariat. As the Commission was still at an early stage in its work, such initiatives might be useful, so he once again put those questions to the Special Rapporteur.

The report relied rather heavily on writers and, like the Institute of International Law, on policy considerations. Given that strong policy component of the approach to the topic, which was probably inevitable, the Commission needed to be particularly mindful of the views of States. It already had the benefit of what they had said in the Sixth Committee in 2017, which was described in the second report. In addition, during the first part of its current session, the Commission had held a side-event at which State representatives had explained the impact of the topic in relation to several situations of State responsibility. That, in his view, had reinforced the need for a close dialogue with States in relation to the topic.

Some of the cases to which the Special Rapporteur referred were controversial and would therefore have to be handled carefully, if it proved necessary to mention them at all in the commentaries.

He generally agreed with the overall approach to the topic outlined in chapter I, section B, apart from the stark separation of succession to obligations and succession to rights proposed in paragraph 21, which might require further consideration at the third report. In chapter II, he supported draft article 5, which was based on article 6 of the 1978 Vienna Convention and on a careful, convincing analysis of the Commission's relevant prior work.

Chapter III, concerning general rules of succession of States in respect of State responsibility, went to the heart of the topic. To some extent, he shared Mr. Park's view that the Special Rapporteur made such extensive exceptions to the general rule of non-

succession that he came close to replacing it. He might be in broad agreement with the substance of draft article 6, but both the text and the explanation of the reasoning behind it were hard to follow. He read the proposed text as meaning that the predecessor State still bore responsibility for its internationally wrongful act, whereas the successor State was not responsible for the predecessor State's internationally wrongful act, except as provided for in later articles. The purpose of the draft article was apparently to set out a general rule of non-succession, but it did so without significant reliance on State practice or *opinio juris* and more by implication from the rules set forth in part one of the articles on responsibility of States for internationally wrongful acts, including those on attribution of conduct to a State. While that approach might be justified, the focus on attribution made draft article 6 rather obscure; what mattered was not so much the original attribution of conduct to the predecessor State, but whether the latter remained responsible after a succession of States. He took it that the phrase "the following draft articles" in paragraph 4 of draft article 6 referred to draft articles 7 to 11. The sentence quoted in paragraph 42, which was drawn from the commentary to draft article 31 of the draft articles on succession of States in respect of State property, archives and debts, was of no obvious relevance, since it concerned State debts and not State responsibility for internationally wrongful acts.

Although the Special Rapporteur might be right that, from a policy viewpoint, the situation where a predecessor State existed and one in which it did not were quite different, it would be necessary to ascertain whether practice supported that position. In draft articles 7 to 11, the Special Rapporteur had been wise to retain the categories of succession adopted in the 1970s, which, although somewhat dated, were well understood by States and international lawyers. New terms should not be introduced unnecessarily. He therefore concurred with Mr. Park that there was no need for the term "secession", since the notion of "separation of part or parts of a State" already existed in the 1978 Vienna Convention.

In view of the lack of State practice regarding succession to State responsibility, it was unsurprising that, in respect of draft articles 7 to 10, the Special Rapporteur had relied on the writings of Patrick Dumberry when considering whether there might be exceptions to the general rule of non-succession to international responsibility.

As far as draft article 7 was concerned, the three circumstances invoked as justification for an exception to the aforementioned general rule might represent good policy choices, but scholarly writings and an overtly policy-based resolution of the Institute of International Law were hardly an adequate basis for proposals to States, other than as *lex desiderata*. Moreover, paragraph (3) of the commentary to article 11 of the articles on State responsibility stated that "in the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory". The reasoning behind the four paragraphs of draft article 7 was hard to perceive. The meaning of the phrase "if particular circumstances so require" at the beginning of paragraphs 2 and 3 would have to be spelled out in the draft article or explained very carefully in the commentary. Similarly, it was unclear what the term "direct link" signified in that context. Paragraph 4, which was drawn from draft article 10 (2) of the articles on State responsibility, was concerned with the attribution of conduct, not State responsibility as such and still less with State succession to State responsibility. It might therefore require redrafting.

In draft article 8, it would be advisable, for the sake of clarity, to define "newly independent State", but there was no need to delve into the question of protectorates. The first sentence of paragraph 2 seemed to be redundant and the meaning of the second sentence called for some explanation. He also wished to know why draft article 8 (3) and draft article 7 (4) were worded differently. Draft article 9 seemed unexceptional. In draft article 10 the rule of succession proposed by the Special Rapporteur was presumably suggested as *lex ferenda*, as it rested on very little practice.

Draft article 11 was perhaps the most difficult of the texts proposed in the second report and would require very careful consideration at all stages. The views of States would be of very great importance for the Commission's future work in that respect. To say that obligations passed, subject to an agreement, to one, several or all successor States was vague and of no great comfort to an injured State. The same was true of the requirement that a successor State should negotiate in good faith. Perhaps the Commission should be

less cautious and follow the lead of the Institute of International Law in its resolution on succession of States in matters of international responsibility.

He was content with the future workplan and would be happy to refer draft articles 5 to 11 to the Drafting Committee.

Mr. Nguyen welcomed the fact that the Special Rapporteur had filled in the lacunae with regard to examples of State practice from regions other than Europe in respect of a topic which essentially combined two sensitive aspects of international law, namely responsibility of States for internationally wrongful acts and succession of States. He endorsed the Special Rapporteur 's approach, which rested primarily on the principle of non-succession while at the same time allowing for some flexibility.

As far as the legality of succession was concerned, it would be advisable to model draft article 5 on the common provisions of article 6 of the 1978 Vienna Convention and article 3 of the 1983 Vienna Convention, as they made it possible to treat succession in a variety of circumstances in a flexible manner. Moreover, they were consistent with the articles on nationality of natural persons in relation to the succession of States. The succession of States was directly linked with changes in territory and population. It affected the vital interests of predecessor, successor or third States and other subjects of international law. State practice showed that dissimilar circumstances led to different kinds of succession. Succession could be a legal tool for realizing the right to self-determination, or it could damage the integrity of a State. It would be helpful if the Special Rapporteur could offer some insight into the consequences for State responsibility of the recognition or non-recognition of a successor State. For example, the non-recognition of a successor State could prolong the negotiation of appropriate compensation for the expropriation of foreign property provided for in article 2 (2) (c) of the Charter of Economic Rights and Duties of States.

Since, traditionally, the State guilty of a wrongful act bore responsibility for it, a wrongful act committed by a predecessor State before the date of succession should logically be attributed to that State alone. However, draft article 6 (1) did not indicate which subject of international law would bear responsibility for an internationally wrongful act committed before the date of succession of States, unlike article 4 of the 2015 resolution of the Institute of International Law, which stipulated that international responsibility arising from an internationally wrongful act committed before the date of succession of States by a predecessor State fell on that State. That contention was appropriate when the predecessor State continued to exist, but it could not apply to a situation where the predecessor State was defunct, or where the successor State assumed the rights and obligations of the predecessor State by virtue of a unilateral declaration. He therefore proposed that the general rule of non-succession should be expressed in language along the following lines: "The internationally wrongful act committed before the date of succession by a predecessor State is not attributable to the successor State unless the latter otherwise agrees." That wording would take account of Mr. Park's wish to replace "attribution" with "attributable" and would be consistent with draft articles 7, 8 and 9. He also agreed with Sir Michael Wood that it was necessary to be mindful of the views of States with regard to succession.

He wished to add some information about the unification of Viet Nam in order to clarify the information in the report, as some writers regarded that unification as the merging of two States to form a new one, whereas others were of the opinion that it was the reunification of two parts of the same country. Both the Agreement on the Cessation of Hostilities in Viet-Nam, signed in Geneva on 20 July 1954, and the Agreement on Ending the War and Restoring Peace in Viet-Nam, signed in Paris in 1973, had sought to preserve the national integrity of Viet Nam. Viet Nam had had two Governments after 30 April 1975; the Provisional Revolutionary Government of South Viet-Nam and the Government of the Democratic Republic of Viet-Nam. The political consultative conference held in Ho Chi Minh City in November 1975 had decided to hold a nationwide general election. It was untrue to suggest, as the report did in paragraph 154, that two national assemblies had merged. The newly elected National Assembly then decided to call a united Viet Nam the Socialist Republic of Viet Nam.

The resolution of issues regarding the expropriation of property in South Viet Nam and the freezing of assets held in banks in the United States of America had been delayed by the refusal of the Government of the United States of America to recognize the Socialist Republic of Viet Nam as the successor to assets of the former Government of South Viet Nam. In fact, those issues had not been resolved until 1995, when the Agreement between the Government of t. United States of America and the Government of the Socialist Republic of Viet Nam concerning the Settlement of Certain Property Claims had been signed. However, that "lump-sum agreement" did not say that the expropriation of property previously owned by the United States of America or its nationals or the expropriation of assets owned by Viet Nam or its nationals were wrongful acts. For that reason, the assertion in paragraph 155 of the report that Viet Nam had accepted "full responsibility for wrongful acts committed by its predecessor State" was incorrect. Moreover, the expropriation of foreign properties by a newly independent State did not always constitute a wrongful act because article 2 (2) (c) of the Charter of Economic Rights and Duties of States permitted such expropriation subject to the payment of appropriate compensation. The special case of a newly independent State called for specific treatment since it transcended the scope of the 2015 resolution of the Institute of International Law, article 2 (3) of which stated that: "The present Articles do not govern the situations resulting from political changes within a State, including changes in the regime or name of the State."

The draft articles should be referred to the Drafting Committee for reconsideration.

The meeting rose at 12.55 p.m.